114-615

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1884.

No. 263.

WILLIAM R. SCHOFIELD, PLAINTIFF IN ERROR,

vs.

THE CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 15, 1882.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between William R. Schofield, plaintiff, and the Chicago, Milwaukee and Saint Paul Railway Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as is said: We, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of March, in the Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and sixth year.

[SEAL.] H. E. MANN,
Clerk of the Circuit Court of the United States of America for the District of Minnesota,
By O. J. REYNOLDS, *Deputy.*

2 UNITED STATES OF AEERICA, *District of Minnesota,* } *ss:*

The answer of the judges of the circuit court of the United States for the district of Minnesota, in the eighth circuit, in within writ mentioned.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the justices of the Supreme Court of the United States of America, within mentioned, in a certain schedule to this writ annexed, marked "Schedule A," as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 5th day of June, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of the United States the one hundred and sixth year.

[SEAL.] H. E. MANN,
Clerk U. S. Circuit Court, Dist. of Minnesota,
By O. J. REYNOLDS, *Deputy.*

3 SCHEDUE A.

United States of America to the Chicago, Milwaukee and Saint Paul Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2 Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Minnesota, wherein William R. Schofield is plaintiff and you are defendant in error, to show cause, if any be, why the judgement in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness M. R. Waite, Chief Justice of the said Supreme Court of the United States, this eighth day of March, in the year of our Lord eighteen hundred and eighty-two.

R. R. NELSON, *Judge.*

4 [Endorsed:] Supreme Court United States. Wm. R. Schofield *vs.* Chic., Mil. & St. Paul Railway Co. Citation. One service of a copy of the within upon us admit-ed, this 9th day of March, 1882. Bigelow, Flandrau & Squires, att'ys for defendants.

5 STATE OF MINNESOTA, *County of Washington:*

District Court.

WILLIAM R. SCHOFIELD

vs.

THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY.

STATE OF MINNESOTA, } *ss:*
County of Ramsey, }

Charles J. Bower, being first duly sworn, says: That he is more than eighteen years of age, and that at the city of St. Paul, county and State aforesaid, on the sixteenth day of April, A. D. 1881, he served the summons and complaint hereto annexed upon the within named The Chicago, Milwaukee and St. Paul Railway Company, personally, by handing to and leaving with John A. Chandler, the general and managing agent of the said The Chicago, Milwaukee and Saint Paul Railway Company, a true and correct copy of said summons and of said complaint.

CHARLES J. BOWER.

Subscribed and sworn to before me, this 18th day of April, A. D. 1881.

[SEAL.]

S. L. PIERCE,
Notary Public.

6 STATE OF MINNESOTA, *County of Washington :*

District Court, 1st Judicial District.

WILLIAM R. SCHOFIELD
vs.
THE CHICAGO, MILWAUKEE AND SAINT PAUL RAILWAY COMPANY.

The plaintiff, complaining of the defendant, alleges:

1. That the defendant is, and at the time of the injuries to the plaintiff, hereinafter set forth, was, a corporation duly organized and created under the laws of the State of Wisconsin, and as such corporation is, and was at the time of said injuries to plaintiff, engaged in the business of a common carrier of freight and passengers by railroad from the city of Chicago, in the State of Illinois, to the city of Minneapolis, in the State of Minnesota.

2. That as such common carrier the defendant for more than three years last past has owned and operated a steam railroad
7 extending and running from city of Winona, in the State of
Minnesota, northward along the Mississippi river, through the county of Washington, in the State of Minnesota, and through the town and village of Newport in said county, up to the city of St. Paul, in the State of Minnesota. That the hereinafter described injuries to plaintiff were done on the said railroad track of defendant in the said town and village of Newport, by defendant's engine and cars propelled by steam in the usual manner.

3. That at the said village and said town of Newport the defendant for more than one year last past has kept and maintained a depot building immediately contiguous to the line of the said railroad.

And that the defendant has for more than a year last past permitted a large warehouse to stand near said depot and said railroad.

That immediately above said depot building there has been for more than a year last past, and now is, a public highway, along which all persons may lawfully travel by day or night, running parallel with said railroad track of the defendant.

8 That at the distance of forty rods above the said depot
building, and in the direction of St. Paul from the same, the said highway crosses the said railroad track of the defendant.

That for more than a year last past the said highway has been, and at the time of the said injuries to plaintiff was, a public thoroughfare, on which there was great and continual travel by the public, all of which defendant well knew at the time of said injury to plaintiff.

That the said depot building and said warehouse are so situated that persons passing along on said highway between said depot building and said crossing cannot see trains, engines, or cars approaching said depot from said city of Winona until such train or engine reaches said depot building.

That for more than a year previous to and at the time of said injuries to plaintiff the defendant negligently permitted the said depot and the said warehouse to stand upon the said line of said railroad, so as to prevent persons traveling on said highway 9 and over said crossing from seeing trains approaching said crossing, from the direction of the city of Winona, in time to avoid collision with said trains at said crossing and injury to said persons.

That at the time of said injuries to plaintiff the defendant negligently failed and omitted to station any person at said crossing, or to give any signal of any description to warn persons about to cross said railroad track of the approach of trains to said crossing.

That the time of the said injury to plaintiff was Sunday, and that the defendant did not usually run trains on its said road on Sunday.

That it was the uniform custom of defendant at and for a long time previous to the time of said injuries to plaintiff to cause all their passenger trains on said railroad to stop at the said depot building when the same was reached.

4. That the said railroad was constructed under and by virtue of an act approved on the 22d day of May, A. D. 1857, and entitled 10 "An act to execute the trust created by an act of Congress, entitled 'An act making a grant of land to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said Territory, and in granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State,' and granting certain lands to railroad companies therein named."

That by said act a corporation known as the Minnesota and Pacific Railroad Company was duly created.

That by virtue of said act and certain acts amendatory thereof and supplementary thereto, the defendant became the owner of said railroad, and acquired the same from and through the said corporation and its assigns.

That at the time of said injuries to plaintiff the defendant owned and operated said railroad subject to the terms and conditions of said act, and the acts amendatory thereof and supplementary thereto.

That section 24 of said act provides that "a bell of at least 11 thirty pounds weight, or a steam whistle, shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where said road shall cross any other road, and be kept ringing or whistling at intervals until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by said corporation, one-half thereof to go to the informer and the other half to the Territory or future State of Minnesota, and to be liable for all damages by reason of such neglect."

That at the time of the said injuries to the plaintiff, the defendant wrongfully, unlawfully, and negligently failed and omitted to ring a bell or sound a whistle, at the distance of at least eighty rods, or at any distance less than eighty rods, or at any hearing distance from said crossing; and at said time said defendant wholly and negligently failed and omitted to give this plaintiff any warning whatsoever of the approach of the train, whereby he was injured.

12 5. That on or about four o'clock in the afternoon of the 13th day of February, A. D. 1881, the plaintiff was passing along said highway between said depot and said railroad crossing toward the said crossing; that while the plaintiff was so passing along said highway at said place, in a cutter drawn by a horse, the defendant was unlawfully, negligently, recklessly, and at an unusual rate of speed, to wit, 30 miles an hour, running a passenger train toward said depot and said crossing from the direction of said city of Winona, but that because of the said obstruction produced by said depot and warehouse, said train could not be seen from the said highway at the place where the plaintiff was passing along the same; that when the plaintiff reached said railroad crossing said train could not and was not seen by him on account of said obstructions produced as aforesaid.

That on account of the negligent and unlawful acts of the defendant in permitting said depot and warehouse to so obstruct the view of the plaintiff at said place, and in failing to have any one
13 stationed at said crossing to warn travelers on said highway of the approach of said train, and in the running of said train at an unusual, unreasonable, and improper speed at said place, and in the total failure and omission of the defendant to give the plaintiff any warning whatsoever, either by blowing a whistle or ringing a bell, or in any other way, of the approach of its said train; the plaintiff, in ignorance of the approach of said train, attempted to cross said railroad track at the said highway, crossing the same, but that when he had got upon said crossing the said passenger train of the defendant which had been at the aforesaid speed, negligently and recklessly run by said depot without stopping at the same, was so negligently, carelessly, unskillfully, and recklessly run by the defendant upon the plaintiff that he was unable to get out of the way of the same, but that the plaintiff was, by reason of defendant's said negligent and unlawful acts, struck by said train and was thereby thrown a great distance, and was thereby greatly and incurably injured in the head,
14 right shoulder, right hip, and right leg and ankle, and his nervous system was thereby greatly shocked. The plaintiff's said shoulder was thereby dislocated and his said hip badly fractured, and his ankle sprained and crippled.

That on account of said injuries the plaintiff has suffered great pain of body and of mind, and that he has, by said injuries, been permanently crippled and permanently rendered unable to perform manual labor or to carry on his business, and that while plaintiff lives he will suffer great pain.

That by reason of said injuries plaintiff has incurred large expense, to wit, $300 for medical and nursing services.

That prior to and at the time of plaintiff's said injuries he did earn, and was earning, and his time and services were of the value of $100 per month.

That prior to said injuries plaintiff was, and carried on the busi-

ness of, a miller, but that by reason of said injuries, plaintiff has
been, ever since such injuries, and is now, forever incapaci-
15 tated from carrying on his said business of a miller; that by
reason of the premises the plaintiff has been damaged by the
defendant in the amount of twenty thousand dollars.

Wherefore plaintiff demands judgment against the defendant for twenty thousand dollars, besides the costs and disbursements of this action.

PIERCE & CONGDON,
Plaintiff's Attorneys, St. Paul, Minn.

Summons.

STATE OF MINNESOTA, *Washington County:*

District Court, First Judicial District.

WILLIAM R. SCHOFIELD, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Defendant.

The State of Minnesota to the above named defendant:

You are hereby summoned and required to answer to the com-
plaint in this action, a copy of which is hereto annexed as is here-
with served upon you, and to serve a copy of your answer to
16 the said complaint on the subscribers at their office, No. 37
Wabasha street, St. Paul, Minnesota, within twenty days after
the service of this summons upon you, exclusive of the day of such
service; and if you fail to answer the said complaint within the
time aforesaid, the plaintiff in this action will have the amount he
is entitled to recover, ascertained by the court or under its direction,
and take judgment for the amount so ascertained.

Dated April 16, 1881.

PIERCE & CONGDON,
Plaintiff's Attorneys, St. Paul Minn.

(Endorsed:) Summons & complaint. Filed May 16, 1881. C. A. Bennett, clerk.

17 *Notice of Appearance.*

STATE OF MINNESOTA, *County of Washington:*

District Court, 1st Judicial District.

WM. R. SCHOFIELD
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

SIRS: Please to take notice that we are retained and appear as attorneys for the defendant in the above-entitled action.

Dated May 10, 1881.

Yours, respectfully,
BIGELOW, FLANDRAU & SQUIRES,
Attorneys for Defendant.

TO PIERCE & CONGDON,
Attorneys for Plaintiff.

(Endorsed:) Due service of the within notice is hereby admitted at St. Paul, Minnesota, on the 10 day of May, 1881. Pierce & Congdon, attorneys for plaintiff. Filed May 16, 1881. C. A. Bennett, clerk.

18 STATE OF MINNESOTA, *County of Washington*:

District Court, First Judicial District.

WM. R. SCHOFIELD
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.

It is hereby stipulated that the defendant in the above-entitled cause may have to and including the 30th day of May, A. D. 1881, to answer or demur to the complaint in the above-entitled action; and it being the intention of said defendant to remove said action to the circuit court of the United States for the district of Minnesota, it is further stipulated that said action shall be placed upon the calendar for trial at the next ensuing term of said circuit court.

PIERCE & CONGDON, *Plaintiff's Att'ys.*
BIGELOW, FLANDRAU & SQUIRES,
Def't's Att'ys.

Filed May 16, 1881.

F. M. CROSBY, *District Judge.*

19 STATE OF MINNESOTA, *County of Washington*:

District Court, 1st Judicial District.

WILLIAM R. SCHOFIELD, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

To the above-entitled court:

Your petitioner, The Chicago, Milwaukee and St. Paul Railway Company, the defendant in the above-entitled action, respectfully shows to this honorable court, that the matter and amount in dispute in the said action exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said action is between citizens of different States; that the plaintiff in said action was at the time of the commencement thereof and still is a citizen of the State of Minnesota, and that your petitioner was at the time of the commencement of said action and still is a citizen of the State of Wisconsin.

20 That the time for your petitioner to answer in said action has not yet expired, and that no term of this court has been held since the commencement of said action.

And your petitioner offers herewith a bond, with good and sufficient surety, for its entering in the circuit court of the United States in and for the district of Minnesota, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this action was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the district of Minnesota.

And it will ever pray, &c.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.
By BIGELOW, FLANDRAU & SQUIRES,
Its Attorneys.

21 STATE OF MINNESOTA, *County of Ramsey*, } *ss:*

George C. Squires, being duly sworn, says: That he is one of the firm of Bigelow, Flandrau & Squires, the attorneys for the petitioner in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the statements therein contained are true, as he verily believes.

GEO. C. SQUIRES.

Subscribed and sworn to before me, this 16th day of May, A. D. 1881.

[SEAL.] HENRY C. JAMES,
Notary Public, Ramsey Co., Minn.

(Endorsed:) Filed May 16, 1881. F. M. Crosby, dist. judge.

22 STATE OF MINNESOTA, *County of Washington:*

District Court, First Judicial District.

WILLIAM R. SCHOFIELD, Plaintiff,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Defendant.

Know all men by these presents that J. A. Chandler, in behalf of the defendant above named, The Chicago, Milwaukee and St. Paul Railway Company, as principal, and Horace R. Bigelow and Charles E. Flandrau as sureties, all of St. Paul, Ramsey county, Minnesota, are held and firmly bound unto William R. Schofield in the penal sum of one thousand dollars, — the payment whereof, well and truly to be made unto the said William R. Schofield, his heirs and assigns, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 16th day of May, A. D. 1881.

23 The condition of this obligation is such, that whereas the above-named defendant is about to petition the above-named district court for the removal of the above-entitled cause, now

pending therein, to the circuit court of the United States in and for the district of Minnesota:

Now, therefore, if the said The Chicago, Milwaukee & St. Paul Railway Company, the said petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said cause, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said cause was wrongfully or improperly removed thereto (no special bail having been originally requisite in said cause), then this obligation to be void; otherwise in full force and virtue.

THE CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY, [SEAL.]
By J. A. CHANDLER. [SEAL.]
H. R. BIGELOW. [SEAL.]
CHAS. E. FLANDRAU. [SEAL.]

In presence of—
ANABEL CHANDLER.
GEO. C. SQUIRES.

24 STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 16th day of May, A. D. 1881, before me, a notary public within and for said county, personally came J. A. Chandler, Horace R. Bigelow, and Charles E. Flandrau, to me well known to be the same persons described in and who executed the foregoing bond, and severally acknowledged that they executed the same for the uses and purposes therein expressed.

[SEAL.] GEO. C. SQUIRES,
Notary Public, Ramsey Co., Minn.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Horace R. Bigelow and Charles E. Flandrau, being duly sworn, doth say, each for himself: That he is one of the sureties named in the foregoing bond; that he is a resident and freeholder of and in the State of Minnesota, and is worth the sum of two thousand dollars, double the amount specified in the said bond, above his debts and liabilities, and exclusive of his property which is exempt from execution.

25 H. R. BIGELOW.
CHAS. E. FLANDRAU.

Subscribed and sworn to before me, this 16th day of May, A. D. 1881.

[SEAL.] GEO. C. SQUIRES,
Notary Public, Ramsey County, Minn.

(Endorsed:) The within bonds and the sureties thereof are hereby accepted and approved, this 16th day of May, A. D. 1881. F. M. Crosby, district judge. Filed May 16, 1881. F. M. Crosby, dist. judge.

STATE OF MINNESOTA, *County of Washington:*

District Court, 1st Judicial District.

WILLIAM R. SCHOFIELD, Pl'ff,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, D'f't.

AT CHAMBERS, HASTINGS, *May* 16, 1881.

26 The defendant, The Chicago, Milwaukee & St. Paul Railway Company, having, on this day, filed its petition for the removal of this action to the circuit court of the United States for the district of Minnesota, together with a bond, with good and sufficient surety, as prescribed by the act of Congress in that behalf, and on motion of Bigelow, Flandrau & Squires, attorneys for said defendant, it is ordered that the said action was, by the filing of said petition and bond, and it is hereby, declared to be removed to the said circuit court of the United States for the district of Minnesota, pursuant to the act of Congress in that behalf.

F. M. CROSBY,
District Judge.

(Endorsed:) Filed May 16, 1881. F. M. Crosby, district judge.

STATE OF MINNESOTA, *Washington County:*

First Judicial District.

27 I, C. A. Bennett, clerk of the district court, Washington county, and State of Minnesota, do hereby certify that I have compared the foregoing paper writings with the original record in the action therein entitled now remaining in my office, and that the same is a true and correct copy and transcript of said original record, and the whole thereof.

Witness my hand and seal of said court, at Stillwater, this 20th day of May, A. D. 1881.

[SEAL.] C. A. BENNETT, *Clerk.*

(Endorsed:) Certified copy of record. Filed June 20, 1881. H. E. Mann, clerk.

28 Circuit Court of the United States for the District of Minnesota.

WILLIAM R. SCHOFIELD
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The defendant, answering the complaint of the plaintiff in the above-entitled action, respectfully shows to the court:

It admits that it is a corporation duly created and organized under and by virtue of the laws of the State of Wisconsin, and engaged as a common carrier of freight and passengers by railroad from Chicago, in the State of Illinois, to Minneapolis, in the State of Minnesota, and that as such common carrier it has owned and operated for more than three years last past a railroad extending from Winona, in said

State of Minnesota, northward along the Mississippi river, through the county of Washington, in said State of Minnesota, and the town and village of Newport, in said county, up to the city of Saint
29 Paul, in said State of Minnesota. It admits that on the westerly side of the depot building and side track of said defendant at said Newport there has been for more than a year last past, and now is, a wagon road running for some distance nearly parallel to the track of said defendant; but as to whether the same is a public highway, as alleged in said complaint, defendant has no knowledge or information thereof sufficient to form a belief, but defendant denies that said alleged highway crosses the said track at a distance of forty rods above the said depot building in the direction of said Saint Paul, and alleges that the same does not cross said track in said direction until it reaches a point at a distance on said track from said depot building of more than seventy rods.

Defendant denies that there is now, or ever has been, great and continual travel over said alleged highway from said depot in the direction of said St. Paul, or that defendant has failed to furnish and provide at said crossing the proper signal to warn persons about to cross said track of the approach of trains to said crossing.
30 On the contrary, the defendant alleges that the said alleged highway is an ordinary country road, and that there is only the ordinary and usual amount of travel thereon; and that there is now, and has been for more than one year last past, erected at said crossing a proper sign-board, which is in full view of persons approaching said crossing from either direction, and is sufficient to warn all persons acting prudently and carefully that they should look both up and down said track for the approach of trains.

Defendant, further answering, alleges that said alleged highway crosses said railroad at grade, and on the same level with said track, and that for a distance of three hundred feet along said alleged highway, in the direction of said depot from said crossing, there is for the whole of said distance a clear and unobstructed view of said track for at least one-fourth of a mile in each direction from the said crossing.

Defendant denies that it not usually run trains over its said railroad on Sundays. On the contrary, it alleges that for more
31 than one year last past it has run both regular and special trains over its said railroad on Sundays.

Defendant further denies that it was the uniform custom of defendant, at and for a long time previous to the time of the injuries to the plaintiff alleged in said complaint, to cause all of its passenger trains to stop at said depot building; on the contrary, defendant avers that it is and has been for more than one year last past the custom of said defendant to run over its said railroad certain regular trains, and, as often as the business of said railroad demanded it, certain other trains known as special trains; that said regular trains usually stopped at said depot building, but that said special trains seldom, if ever, stopped at said depot building, and that said special trains had no regular time for running, but were run when the exigencies of travel demanded them, and at all hours of the day and night.

Defendant admits that it has a depot building and a warehouse
32 standing near its said track at said Newport, but it
denies that said depot building and said warehouse are so
situated that persons passing along on said alleged highway between
said depot building and said crossing cannot see trains, engines, or
cars approaching said depot from said city of Winona until the same
reach such depot building, or that the said buildings are so situated as
to prevent persons traveling on said alleged highway, and over said
crossing, from seeing trains approaching said crossing from the direction
of said Winona in time to avoid collision with said trains at said
crossing; and alleges that such trains, engines, or cars can be seen by
persons so passing along said alleged highway for more than one-eighth
of a mile before the same reach the said depot building coming
from the direction of said Winona, and in ample time to avoid
collision with said trains at said crossing.

Defendant admits that the said railroad was counstructed under
and by virtue of the act of the Legislative Assembly of the
33 Territory of Minnesota, referred to in said complaint, and
that section 24 of said act is as stated in said complaint, and
that by virtue of said act a corporation known as "The Minnesota
and Pacific Railroad Company" was created, and that this defendant
became the owner of said railroad through the said last-named
corporation and its assigns; and that at the time of said alleged injuries
to said plaintiff the defendant owned and operated said railroad
subject to the terms and conditions of said act, and of the acts
amendatory thereof and supplementary thereto.

Defendant further answering alleges, that on or about four o'clock
in the afternoon of the 13th day of February, A. D. 1881, and while
the defendant was engaged in operating the said line of railroad,
one of said special trains of said defendant while passing from said
Winona to Saint Paul at a safe and usual rate of speed, to wit, at
the rate of twenty-five miles per hour, in the charge and under the management
of the defendants' servants, skilled in such management,
34 and in the business of moving and operating railroad
trains, and while being in all respects lawfully, skillfully,
prudently, and carefully moved and managed by such servants,
was at said crossing, although the proper and lawful signals and
warning had been given therefor, carelessly, negligently, and unlawfully
run into and struck by the horse and cutter mentioned in
said complaint, in which cutter said plaintiff was seated, and that
plaintiff by reason of such collision was thrown from said cutter
and thereby injured to some extent, but as to what extent or in
what respect the said plaintiff was injured defendant hath not any
knowledge or information thereof sufficient to form a belief; and
defendant alleges that the said collision with said train and said
injury to said plaintiff above mentioned are the same collision and
the same injury to said plaintiff alleged in said complaint, and no
other.

Defendant expressly denies that the said collision of said horse

and cutter with said train, or the said injury to said plaintiff,
35 alleged in said complaint, was owing to or in consequence of
any negligence of defendant in the running or the management of the said train, or in the failure of the defendant to give the proper signals of the approach of said train to said crossing, or in the situation or location of the said depot building or warehouse, or otherwise, and denies that defendant was guilty of any negligence or carelessness whatever in the premises; on the contrary defendant avers that said collision and said injury to plaintiff resulted wholly from the negligence of the said plaintiff, and directly from the said horse becoming unmanagable and running away, and from the careless, negligent, and unskillful, reckless, and unlawful driving and management of the said horse by said plaintiff at the time and place mentioned in said complaint.

And defendant denies that, at the time of the said collision and of said injury to plaintiff, the defendant failed or omitted to ring a bell or sound a whistle on the approach of said special train to said
crossing; on the contrary defendant alleges that the whistle
36 on said train was sounded, and the bell rung at a point dis-
tant at least eighty rods from said crossing, and that the same were sounded and rung at intervals from said point until said train had passed said crossing.

And defendant further alleges that, at the time of said collision, and for a long time prior thereto, the said plaintiff had resided in said town of Newport, and was thoroughly familiar with the situation and location of said depot building, warehouse, and tracks of said defendant at that place, and also with the situation and location of the said alleged highway and the said crossing.

And except as hereinbefore admitted or answered unto, the defendant denies each and every allegation, matter, and thing in the said complaint contained.

Wherefore defendant demands judgment that the plaintiff take nothing by his said action, and that this defendant recover of the said plaintiff its costs and disbursements thereof.

BIGELOW, FLANDRAU & SQUIRES,
Def't's Att'ys, St. Paul, Minn.

37 (Endorsed:) Due service on us of a copy of the within
answer is hereby admitted, this 30th day of May, A. D. 1881. Pierce & Congdon, pl'ff's att'ys. Filed June 20, 1881. H. E. Mann, clerk.

38 United States Circuit Court for the District of Minnesota.

Term minutes. June Term, A. D. 1881. June 24, 1881.

Present: Hon. Geo. W. McCrary, circuit judge.

WILLIAM R. SCHOFIELD,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

This cause coming on for trial, the plaintiff appeared by Messrs.

Pierce and Congdon, his attorneys, and the defendant by Messrs. Bigelow, Flandrau & Squires, its attorneys.

Whereupon a jury being called, came, to wit:

L. Judd, Joseph Rief, Stephen Graham, M. Gaus, Washington Pierce, Henry M. Crandall, and the regular panel being exhausted, the following talesmen:

Noah M. Sinks, Leander Gorton, R. H. Stevens, S. Henry, Charles Olmsted, & C. S. Hummerson, who are duly impaneled and sworn.

S. L. Pierce, Esq., opens the case for the plaintiffs.

Wm. R. Schofield is sworn and examined as a witness for plaintiff.

Dr. A. H. Stein " " " " " "

Mrs. Schofield " " " " " "

Wm. R. Schofield recalled & further sworn and examined as a witness for plaintiff.

Henry C. Monroe is sworn and examined as a witness for plaintiff.

Edward George " " " " " "

39 United States Circuit Court for the District of Minnesota.

Term Minutes. June term, A. D. 1881. June 25, 1881.

Present: Hon. Geroge W. McCrary, judge.

WILLIAM R. SCHOFIELD

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

This cause coming on for further trial, the parties appeared by their said attorneys, and the jury, heretofore impaneled and sworn herein, being called, came also.

Henry C. Monroe is further examined and sworn as a witness for plaintiff.

George Croshow is sworn and examined as a witness for plaintiff.

Isaac E. Trevet is sworn and examined as a witness for plaintiff.

Gilbert M. Bigelow is sworn and examined as a witness for plaintiff.

Levi Bailey is sworn and examined as a witness for plaintiff.

H. A. Durand is sworn and examined as a witness for plaintiff.

And here the plaintiff rests his case.

The defendant, by its attorneys, moves the court to instruct the jury to find a verdict for the defendant; which motion, after argument by Chas. E. Flandrau, Esq., for the motion, and S. L. Pierce, Esq., against the same, is submitted to the court.

40 United States Circuit Court for the District of Minnesota.

Term Minutes. June Term, A. D. 1881. June 27, 1881.

Present: Hon. George W. McCrary, judge.

WILLIAM R. SCHOFIELD

vs.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The cause coming on for further trial, the parties appeared by their said attorneys, and the jury heretofore impaneled and sworn herein being called, came also.

The motion of the defendant that the court instruct the jury to find a verdict for the defendant having been duly considered, the court granted the same, and so instructed the jury, who thereupon, without leaving their seats, say that they find a verdict for the defendant.

On motion of the plaintiff, forty days' time was given within which to prepare a bill of exception, and it is ordered that all further proceedings herein be stayed until the expiration of said time.

41 Circuit Court of the United States, District of Minnesota.

Wm. R. Schofield
vs.
The Chicago, Milwaukee and St. Paul Railway Company.

We, the jury in the above-entitled action, find a verdict for the defendant.

LEVIS JUDD, *Foreman.*

(Endorsed:) Filed June 27, 1881. H. E. Mann, clerk.

42 Circuit Court United States, District of Minnesota. June, 1881.

Wm. R. Schofield
vs.
Chicago, Milwaukee & Saint Paul Railway Company.

McCrary, circuit judge:

The plaintiff having closed his evidence, the defendant moves the court to instruct the jury to find for defendant upon the ground that the plaintiff, by his own showing, was guilty of negligence, which contributed to the accident by which he was injured. It is now settled law so far as the Federal courts are concerned, that if upon the evidence the court would set aside a verdict against a party if rendered, it is its duty to charge the jury not to return such a verdict.

Pleasants *vs.* Fant, 22 Wall., 119.
Improvement Co. *v.* Munson, 14 Wall., 442.
Railroad Co. *vs.* Houston, 95 U. S., 697.

This rule devolves upon the court upon this motion the duty of determining whether, upon the evidence as it stands, a verdict for plaintiff could be upheld. The question is not whether upon the facts, in the opinion of the court, such a verdict ought to be rendered. If the court were to assume that to be the question, it would usurp the province of the jury. The question is whether if a verdict were rendered for the plaintiff upon the evidence
43 now in, the court would set it aside upon motion, as being
contrary to the evidence, and it is to be judged by the same rules that would prevail upon the consideration of such a motion after verdict. Let us enquire then, whether upon the evidence the

the court say: "On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed without evidence that they do not exercise proper care in a particular case. But notwithstanding the hazzard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them—such, namely, as an ordinarily prudent man would exercise under the circumstances.

"When such is the case, they cannot obtain reparation for their injuries, even though the railroad is in fault. They are the authors of their own misfortune."

In the case of Railroad Co. *v.* Houston, 95 U. S., 697, this precise
question was considered. It is true that in that case the person
48 killed was crossing the track a short distance away from the
public crossing, but the court said that aside from this fact
"the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from taking ordinary precautions for her safety;" and the court further say that "negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant."

Upon the authority of these cases I am bound to hold that the failure of the engineer to give the customary signals of the approach of the train did not relieve the plaintiff from the duty of looking back at least so far as the depot before going upon the track.

This brings me to the only remaining question in the case, Was the velocity of the train so great that if the plaintiff had used ordinary care and caution he would have been unable to prevent the accident?

49 Ordinary prudence required the plaintiff to look for a coming train before proceeding so near the track as to be unable to prevent a collision.

If one drives his horse so near the track as to be in danger from a passing train before looking out, he cannot excuse himself upon the ground that he was unable, after looking, to escape unhurt. He must look out in time to avoid a train if one is approaching.

But it is said that he could not see the approaching train beyond the depot unless he looked at a distance of thirty-two feet from the crossing. This is true, but the distance to the depot was seventy rods; and even if the train was moving at the extraordinary speed of fifty miles an hour, it must have passed the depot when the plaintiff was at least one hundred feet from the crossing. While a train running at fifty miles an hour is travelling seventy rods, a horse, even if walking, would travel at least one hundred feet. It is highly improbable either that the train was moving at that speed, or that the horse on a severely cold day would move at a slow pace. But giving the plaintiff the benefit of every doubt, it remains manifestly true that the plaintiff, when within one hundred feet of the crossing, might have seen the train coming from the depot, and might have avoided the accident by stopping until it passed by.

50 It is of the utmost importance that the rules of law governing this question of negligence on the part of the employés of railroads, as well as on the part of the travelling public, should be thoroughly understood and rigidly enforced. Railroads are being rapidly constructed in every direction. They necessarily intersect the common highways at numerous points. The rules of law to which I have referred, requiring equal care and caution on the part of those who run railroad trains and those who travel the highways, if obeyed, will prevent accidents. We must hold all parties to its strict observance. Because this is in my judgment a case in which these rules were disregarded by the plaintiff, I am constrained to hold that he cannot recover, and therefore sustain the pending motion. I am the better satisfied with the ruling, because the case would, I presume, in any event, go to the Supreme Court, and upon the record thus made up the plaintiff can take exceptions and have the questions upon which he relies fully and fairly presented to that tribunal.

United States Circuit Court, District of Minnesota.

WILLIAM R. SCHOFIELD

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

51 This cause came on to be tried before Hon. George W. McCrary, judge of the circuit court for the eighth circuit, with a jury, on the twenty-third day of June, A. D. 1881. Pierce & Congdon and Sanborn & Sanborn appeared as counsel for the plaintiff, and C. E. Flandrau, Esq., appeared on behalf of the defendant.

Mr. PIERCE, of counsel for the plaintiff, opened the case to the court and jury.

WILLIAM R. SCHOFIELD, sworn and examined as a witness upon his own behalf, testified:

Q. By Mr. PIERCE: You are the plaintiff in this case, are you?

A. Yes, sir.

Q. What is your age?

A. Thirty-six.

Q. Previous to the injury which you suffered in this case, what was your physical condition as to health of body and of mind?

A. It was good.

Q. Memory good?

A. Yes, sir.

Q. Have you any knowledge in regard to the accident—how it happened—any personal knowledge?

A. No, sir.

Q. When did you first have any personal knowledge of your condition?

A. It was the next morning. I was at the hospital in this city.

It is admitted that plaintiff had been brought from the place of the accident, some ten miles, and put in the hospital in the city of Saint Paul.

Q. Describe what your feelings were as to where you were hurt.

A. Well, I was hurt in the back of the head, and in my right shoulder, and my right hip and ankle.

52 Q. How long were you confined to your bed by this injury?

A. I was 38 days at the time I got up and set in the chair.

Q. What was the fact in regard to suffering pain during that time? State whether you suffered pain.

A. Well, I did; yes, sir; considerable.

Q. In what way did you suffer pain?

A. Well, in confinement, and also in pain in my hip and ankle. The ankle, I think, was rather the most painful of the two. My shoulder did not seem to bother me so long. It got well; at least, got better. At first, for a while, I suffered pain in my bowels; that is, in the lower part of the bowels.

Q. About what time were you able to leave your room?

A. It must have been ten days after I got into the chair.

Q. What is the present state of your feelings since you have been out—from that time to this?

A. Well, I have pain in the ankle now. My hip does not seem to pain me a great deal, unless I wrench it. If I wrench it, it pains me; if I don't, it does not seem to hurt a great deal.

Q. Have you any sensation of any other kind which you have not mentioned in your leg, knee, or ankle?

A. Well, this knee is weak. There is a numbness just above the knee; in the muscles, I should think.

Q. Has that grown worse, or better?

A. Well, I think it is rather getting better.

Q. In regard to your capacity to sleep—what is that?

A. Well, it is not good; I don't sleep good nights. I am awake a good deal nights on account of the ankle. It is more if I walk considerable.

53 Q. It makes you sleepless?

A. Yes, sir.

Q. You say you were struck on the head?

A. Yes, sir.

Q. What part of the head?

A. In the crown, I think; near the top of the head.

Q. Have you got a scar there?

A. Yes, sir.

Q. Since the injury, what is the fact about your memory and your ability to do business?

A. Well, I don't think it is good.

Q. In what way does it affect you?

A. Well, it seems to be roiled up—confused, so that it bothers me to get together.

Dr. A. H. Stein, sworn and examined as a witness for the plaintiff, testified:

Direct examination by Mr. Pierce:

Q. Where do you reside?

A. In Cottage Grove.

Q. How far from the residence of the plaintiff here?

A. About 7½ or 8 miles.

Q. What is your occupation?

A. Physician and surgeon.

Q. How long have you been engaged in that occupation?

A. A little over seven years.

Q. In what school, if any, did you study?

A. In the Rush Medical, at Chicago.

Q. Are you a graduate of that school?

A. Yes, sir.

Q. How long have you been in practice in this State?

A. Seven years last April.

54 Q. At that place?

A. In Cottage Grove; yes, sir.

Q. Do you remember of having been called to see the plaintiff at the time of the injury that the plaintiff has referred to or afterwards?

A. I saw him first about ten days after his injury. This happened on the 13th of February. I saw him a week from the next Tuesday. I think he was brought back to Newport on Sunday, and I saw him on Tuesday.

Q. Did you examine him professionally at that time?

A. Not on Tuesday. I saw him on the next Thursday.

Q. When did you professionally examine him?

A. On Thursday.

Q. Did you give him a careful examination?

A. Yes, sir.

Q. State to the jury what his condition was at that time.

A. There was an injury on his head at that time. It did not seem to bother him much. There was some thickening of the scalp. His shoulder was very much swol-en. The dislocation had been reduced. He informed me that his shoulder had been dislocated. The hip bone was broken.

Q. Where?

A. The upper portion. The crest of the hip bone. The limb was very much swollen from the hip clear to the shoulder, and there was bruises on the outer side of the right limb from the knee to the ankle.

Q. Will you give a careful description of the appearance of that bruise and its general character?

A. The limb was very much swollen; it was swollen enormously.
There had been some liniment applied, and that, with the in-
55 flam-ation, the outer skin was being thrown off. Wherever
the bruises were it was a darker color than the surrounding
tissue. There was circumscribed patches where the blood was thickened and congested underneath, showing the result of direct violence.

Q. About how much was it swollen?

A. At the ankle, with both hands I could not quite encircle the limb.

Q. You knew the cause of his injury at the time you examined him?

A. Yes, sir; as the result of the injury he was suffering intense pain from the distension of the tissues; by tissue I mean the muscles and the sheath surrounding the muscles; all the organs. The tissue was swollen.

Q. How long did you continue to visit him?

A. Well, I was there every two or three days for, I think, three or four after he was around.

Q. Let me enquire of you in regard to the characteristics and results ordinarily taking place, of a permanent nature. I mean from such bruises as those upon the limb and ankle.

A. I think the limb will be always permanently enlarged, because there has been such a distension of the limb that the muscles will never regain their original size. The blood vessels have been themselves distended, and the ex*h*udation that was thrown out into the tissues will become in time organized — become a part of the body
itself. In most cases, or a great many, it is reabsorbed.
56 Q. What do you mean by ex*h*udation?

A. Well, the ex*h*udation is a pouring out—flowing through of the liquid portions of the body that should be contained in the vessels; a bursting through the vessels and permeating and diffusing through both the muscles and the surrounding tissues the part where it was bruised; or it may be general.

Q. Does it sometimes occur that, for instance, in the fracture of the hip bone at this place—the pelvic bone—would temporarily cause a distension of the tissues or swelling of the limb in the neighborhood of the ankle and the leg below the knee?

A. Yes, sir; it usually does.

Q. Have you recently examined Mr. Schofield?

A. Yes, sir; within a few days. I gave him a thorough examination.

Q. You may state what condition you found him in at this time.

A. The limb is still enlarged, and there is a hardening of the muscles; also around the ankle; some hardening above the knee, and the calf of the leg is still swollen; has become very much hardened—harder than naturally.

Q. Let me ask you if his limb remains so stiff that he is not able to put on or pull off his stocking?

A. Yes, sir; I know that is a fact.

At this stage of the proceedings the plaintiff's stockings were removed and the Doctor proceeded to explain to the jury the location and character of the injuries which the plaintiff sustained.

WITNESS: The permanent injury is here in the joint (indicating).
That effusion is poured in around the joint, and is being or-
57 ganized there, and will obstruct the motion of the joint. He
will never regain, in my opinion, the perfect use of that joint, so that it will become as strong as the other. On the opposite side is where the bruises were. The principal bruises, when I first saw him, was from here up to here, and on this protruding portion of the calf of the leg. There was also some injury opposite—about three or four inches above. That was here (indicates); a place about the size of my hand. It was black and blue at the time I saw it first. This on the ankle continued for three or four weeks; the same here (indicates). The toes were very much distended. In fact, they were so swollen that they could not have been very much more distended without bursting. In fact, I thought at one time that the foot would burst. The calf of the leg is still swollen. It is swollen at the knee—a very little only. It is harder than the other knee.

MR. SCHOFIELD: The plaintiff here testified that since the injury he has never been able to put his stocking and shoe on.

Q. Dr., from the examination you have given his leg recently and within a few days, and of his person generally, are you able to state whether this swollen condition of the ankle and this lameness of the ankle, and the general difficulties of the knee and the ankle, are the result of the injury in the hip?

A. No, sir; I think not. It was caused from an injury; from direct violence—violence at a distance. The distension would not be
so long continued, because the vessels themselves, although
58 they would be injured by over-distension, would not be rup-
tured, as in this case, to such an extent. I determine that from the condition of the limb from the bruise. Those injuries, in my opinion, were sufficient, and the legitimate cause of the present condition.

The doctor here exhibited to the jury, as illustrating plaintiff's injury to the hip, the pelvic bones of a skeleton, and stated the office of the same. He explained that the fracture, as near as could be determined from the examination, was upon a certain portion of the pelvic bone, indicating the portion.

Q. Was it an entire fracture.

A. Yes, sir.

Q. Are there any important nerves of the body in that locality?

A. The veins pass out across the bone to the back of the thigh. The sciatic nerve is in that portion of the body.

Q. Are there any blood vessels or muscles in that connection?

A. Yes, sir; the muscles of the hip and some muscles of the thigh.

Q. Is one able to determine to what extent permanent injury may result from a fracture of that part of the pelvic bones?

A. No, sir; you could not determine that accurately. An injury of the upper portion of the pelvic bones has not usually many symptoms to notice, unless the internal viscera is injured. If the bone is broken farther down, it is almost always an internal injury, which soon results fatally. In this case the permanent injury, if any, would be the difficulty of maintaining the body erect.

Q. Taking that injury in the neighborhood of the sciatic nerve in connection with the serious bruises and injuries from that
59 down to the ankle, in the manner that you saw it, and understand how it is, what predisposing condition or difficulty would be likely to ensue?

A. It would be very apt to induce neuralgia of the limb.

Q. It would be likely to do that?

A. Yes, sir.

Q. To what extent is the likelihood; what are the probabilities?

A. That would be pretty hard to determine in the present condition of his limb. There is still an extensive effusion in the limb. That pressing on the nerves will of course make him more susceptible to any external influence which would induce neuralgia. If the system was in health it might ward it off. As it is now, it might be more apt to succumb to it.

Q. You heard him mention this matter of numbness. How do you account for that?

A. That ex*h*udation—pressing on the nerves.

Q. What are the peculiarities of this injury to the ankle in the way of disabling him in the use of his leg?

A. I think he never will have the free use of the joint.

Q. To what extent will it interfere with the use of his leg, foot, and ankle, compared with no leg at all; or with it in that condition, about what would be the condition?

A. There would be a difficulty of walking on account of the impairment of motion. There will always be a halt in his gait. He will always be lame. He cannot walk up stairs and down stairs. I don't think he will ever walk straight up stairs.

Q. Well, in regard to the veins that are there, is there anything likely to follow as to the veins in that part of the leg?

60 A. There is a liability to the formation of enlarged veins; the blood stagnates in the veins.

Q. What is the probability of such formation in his case from what you have seen of it?

A. Well, the veins are not very greatly enlarged as yet. It is something that will come out gradually. In his case I should be afraid that it will supervene in a very short period, probably in the course of two or three years.

Q. What is the effect of such veins as those on the health and utility of the limb?

A. Well, in varicose veins; any person who is very much on his feet, the veins become so distended that they suffer a great deal of pain, and occasionally the veins become ruptured and result in what is called fatal bleeding.

Q. Where, in your opinion, so far as the injury of the vein is concerned, is it, the injury to the hip or this difficulty below the hip?

A. I think below the knee.

Q. What is the usual result of injuries of the kind that you saw that he had, present and prospective as well?

A. Certainly, he would be in intense pain.

Q. In what respect does the injury to the pelvic bone create pain?

A. Any movement of the body would cause the fragments to grate upon each other, and would of course cause pain. Also from the nerves and the swelling. Any fracture of the pelvic bone in that portion is the result of direct violence; most usually we would find some external evidence of it.

Q. In regard to the injuries in the neighborhood of the
61 ankle, injuries like this, what is the usual effect of those as to
the production of pain?

A. There would be more pain there than there would be in the hip, because of the tissues being bound down by the muscles. There is not so much room for it to swell as there is further up on the limb, where there is more tissue.

Q. Now in regard to the continued condition of his ankle and leg, what in your opinion are the probable characteristics of the injuries as to the continuation of pain?

A. I think there will always be a pain there from the pressure of the nerve. As long as that effusion remains around the joint it will cause pain. Neuralgia is pain in the nerve; that is the meaning of the term. In case that sets in it may produce deformity of or wasting of the muscles. The muscles waste away or become useless. That does not usually set in until sometime after the injury. It is not time yet for it to set in. I do not see any symptoms of it yet any more than from the effusion that is in there now. I don't think that effusion will ever be absorbed. I don't know as it will ever increase, but attempting to walk on his limb will of course cause an enlargement. If he should attempt to walk much on his limb, for instance, going up and down stairs in a mill, it will cause a gradual enlargement of the limb.

Q. Is it probable that he will be able to carry on the avocation of miller?

A. I don't think it will be safe for him. I don't think he will be able to do it.

62 Cross-examination by Mr. FLANDRAU:

This is the pelvic bone of a man. In determining the point of the fracture of that bone in the plaintiff, I put my hand on it, and felt that it was broken. I did not set it. It is not loose now. It either set itself or Dr. Murphy set it. It was set before the patient came into my hands. In fracture of the pelvic bone the most usual treatment is to let them alone, unless the fragment is driven in.

Then you try to pass the fingers behind and put it back in place, and keep the portion in perfect repose. I don't think Dr. Murphy put any dressing on this fracture at all. I don't know whether the fragment was out of place; whether it was driven in or not. I know it was fractured. That is all I know about it. The fracture has united. I do not mean to say that the sciatic nerve was severed in this case. It was only injured from the bruise. It received some shock from the concussion that fractured the bone. The muscles that proceed from that part of the skeleton were bruised. It is the natural tendency in healthy subjects to recover from such injuries. The muscles have not entirely recovered in this case. I don't think they will ever be the same as before. The part that is injured never returns to its original vitality. My idea is that if a man gets a severe bruise he never becomes perfectly sound. It very often happens that a man's arm or leg is broken and pretty seriously smashed
up, and it does get practically well. This injury occurred on
63 the 13th of February. He came back to Newport on the 20th.
I think he was back there the 8th day. I have attended him since as he needed it up to the present time. The last time I saw him was along some time in April. It was about two months that I attended him. I did not find any place in the leg where there was a bone broken. I don't want to be understood that there was any bone broken in the leg. The bruise was what you might call a pretty bad bruise. It was a very bad bruise. The veins were enlarged the last time I examined them. I think they are enlarged now. Varicose veins do not always show themselves from the surface. They may not be visible, because not near the surface. If they are very near the surface they show themselves. There is no visible symptom of them now. The reason I have to believe that there are symptoms that are invisible is that there is impaired muscular action in the limb. From the limb remaining swollen it certainly has prevented a free return of the blood. There is no inflamation in the limb now. I said that the result might be that the ankle would become a little stiff, so that he would not have all the actions of the foot. You can't say certainly as to anything in medicine, or in surgery either. The possibilities of his losing all the actions of his foot and ankle-joint are not based on conjecture or speculation, but we judge from the experience of others. You can prophecy nothing in regard to the future. The plaintiff certainly — to be a promising subject to overcome a difficulty of this kind. His
chances ought to be as good as anybody's. When I saw the
64 wound on the back of the pl'ff's head I think there was a
slight abrasion. There was nothing that indicated a fracture or an injury to the brain from that only. The concussion there was no injury to the bone. That got well pretty quick.

Redirect examination by Mr. PIERCE:

At his age in ordinary persons the vitality is good. I have been acquainted with the plaintiff for three years and a half. From what I have known of him, to the best of my opinion, I don't think he will ever recover the perfect use of his limb. I don't think he will ever recover the use of his limb sufficiently to earn a living by his labor. I don't think he will ever be able to walk without the use of a cane to any extent. I don't think he will ever be free from pain. It is difficult to determine as to what extent the injury has extended to the ankle joint. I am not able to determine that question. Whether it was anything more than a bruise I could not tell at this time. If the surgeon sees the limb at the time it is injured, before much swelling takes place, he is able to determine; after that he is not able to do so until the swelling is gone. The ankle and the knee are two of the worst joints in the body, more susceptible of injury and harder to cure when injured. I believe a wrench or sprain of the knee or ankle is considered almost equivalent to a fracture of the bone. I believe that most surgeons would prefer to treat a fracture of the bone than a wrench of one of those joints.

Recross-examination by Mr. FLANDRAU:

65 The plaintiff can work at his occupation, that of miller, but I don't think he will be able to get around the mill. There is also the probability of neuralgia causing a wasting of the muscles.

Mrs. SCHOFIELD, sworn and examined as a witness for the plaintiff, testified as follows:

Direct examination by Mr. PIERCE:

I am the wife of the plaintiff; was his wife at the time of the accident. I saw him the same evening he was hurt. After the injury I saw him in St. Paul, at St. Joseph's Hospital. I came up as soon as I heard of his injury; they ran a train down for me. When I went in he seemed to know me; he did not seem to be conscious at anything else. I staid with him that night, and all the time. He complained a great deal of his hip and his whole side; he couldn't move his right hand, only just his fingers. His shoulder seemed lame. He complained of his ankle and leg. He did not complain so much when I first went. Before moving he complained and it began to swell. I remained with him at the hospital here. I think it was the next morning between 9 and 10 o'clock that he first seemed to come to. Then he seemed to become rational. When Dr. Murphy came in was the first I noticed. During the time he remained here in St. Paul, he was in a great deal of pain. He did not sleep more than half an hour at a time. He did not sleep only about fifteen minutes at first. He complained of his hip and whole limb and ankle. The last nights he com-
66 plained more of his ankle. When he went home I went with him. He was taken home on the cars. They took a special train and ran down for him. He was not able to sit up. He was carried on a *streacher*. When he got home he remained confined to his bed 38 days. It was necessary to have watchers to assist in taking care of him for about three weeks. During this period I watched with him a great deal. He suffered a great deal during that time. He could not sleep nights as long as he had watchers. He complained of his ankle and hip. His ankle pained

him the most. When he got up he did not complain of his hip so much, only when he jarred it a little. When he jarred it a little it pained him a great deal, but he complained more of the ankle. After he got up he did not sleep good, and he does not sleep good now—not as he used to. It was a long time after he got up that he could not get into bed, and he could not get out of bed. He tried to work after he got around a little, but he could not work. He had to sit down if he tried to do anything. I have noticed a change with regard to his memory to some extent. Sometimes when he tries to think of anything he is confused. He don't seem to remember as he used to. That condition still continues. When he is trying to tell anything he seems to get confused in it when he tries to give any account of anything. He has never taken off or put on his stockings since the injury. He has tried to do so. He cannot get down to his foot. He never has touched his foot yet.

Cross-examination:

67 Since this accident I have seen plaintiff attempt to cast up accounts but two or three times there at home. It was just some things he had been getting in St. Paul, and he came home and tried to figure up what they came to. That is what I refer to as to his not being as clear as he was before. That is not all of the symptoms. One day he was talking of his true age. He tried to make me believe he was older, and it was a long time before I could convince him.

Redirect examination:

He came in, and I said: "To-morrow is your birthday." "Yes," said he; "I am 38 to-morrow." "No," said I, "you are 36." "No," said he, "I am 38." Said I: "You are not that much older than I am;" but he did not give it up for a long time. Then he said he didn't know but what I was right. I knew what his age was understood to be before this.

William Shofield, recalled as a witness on his own behalf, testified:

My occupation is that of a miller. I have been engaged in that business 10 years this fall. The last I worked by the month I received one hundred dollars a month wages. That was at Minneapolis. That would be three years ago this fall. At the time of this injury I was a miller at Newport. At that time I was earning from six to eight dollars a day, as near as I can recollect. I was carrying on a mill. There was a good deal out on the books. In
68 carrying on a mill there is sometimes considerable necessity
to be around pretty lively. As a rule that is necessary. Sometimes you want to be way at the top of the mill and at the bottom at the same time. Since my injury I have not been able to work at that business. I have assisted some three or four days in the mill. The effect has been that I am not able to get up and down stairs at all. I could merely watch the grinding of the wheat

and watch around. That is about all. I could do no labor to amount to anything.

I have no knowledge of being hurt. I don't remember anything about it. I did not see no train. I have no consciousness as to the manner of how I was hurt or what did it to this day. I did not see the approaching train. I don't have any remembrance particularly of having looked for a train or not having looked at the time I approached that crossing. I don't know that I ever catched myself going across the track without looking both ways. I generally calculate to be pretty careful, and I have been twitted of being a coward for being so careful. I think I must have looked of course.

The last statement of the witness was objected to as being too remote, and plaintiff's counsel did not insist upon the testimony.

Witness: I have stated it was my habit of being very careful by looking up and down the track. I was familiar with the crossing at that place. I have passed it several times. I was riding in a cutter—another man with me. That man was C. K. Manning. We
had one horse—a brown pony. I called him very slow. I
69 say he was a slow horse. I frequently used to be along with
him when there were trains at the depot. I never drove him near to trains in St. Paul unless it would be over the Seventh-street bridge. There the trains would be right under him. When in the neighborhood of trains he acted afraid. He was afraid of the cars, but he never undertook to run with me in the world. If a train was coming up behind him he would stop and turn right around, and he would tremble. He never tried to run. I got the horse about this time last summer. I had used him a good deal in driving in this manner—very frequently. The man that was with me was killed.

I remember nothing about looking or not looking. I have no knowledge of it whatever. I have no knowledge of any train, or of anything happening to me. The last thing I remember plain in my mind was being at Mr. Parker's barn. That is a distance of eighty or one hundred rods, perhaps, below where Mr. Manning lived. I don't know what calls that to my mind. I drove out to Mr. Manning's house, and he was not at home, and so it was cold, and I wanted to stir my horse, and I drove down to Mr. Parker's barn, and I stopped to talk with his man. That was quite a ways from where the accident took place—a mile, perhaps; it may be a little less. I don't remember clearly of meeting any one after leaving that barn. By their telling me that I met two gentlemen, it is rather dim; but then I could not tell anything about what was said
nor anything of the kind. The first knowledge that I had
70 after the injury was at the hospital. Dr. Murphy came in
and said: "How are you, anyway; do you know anything yet?" and that seemed to wake me up, as though I was asleep. That was the next morning—Monday morning. I couldn't say, of my own knowledge, whether it was that morning or Tuesday morning. But that Monday morning I remember. He usually came in the forenoon. So I should suppose it was in the morning.

Cross-examination by Mr. FLANDRAU:

Q. How did you get into the court room here to day?

A. I came up stairs. I came up alone. I walked up. I came up here to court on Tuesday morning. I have been up and down the stairs every day since. I couldn't say as to how many times, twice any way. I came in the morning generally. When the court adjourned for dinner I went down for dinner, and I generally came back, and then I went down again in the evening. So that I went up and down the stairs four times a day. I stop and sleep up at the Tremont House. That is down on Eighth street, I think. It has been my habit to walk up and down.

I have lived in the vicinity of where this accident happened three years this fall, that is, since I came there this last time. I have been acquainted there for 15 years. My wife was born there.

The last place I stopped before this accident I think was at Mr. Parker's barn; I should judge that was about a mile from the crossing. The railroad runs there, I think, a little west of north. Mr. Parker's
barn is down the river from that point about a mile down
71 towards Hastings. It is on the west side of the railroad; that
is the side on which I drove up. I have no clear recollection of anything that transpired after I left Parker's barn. It was a very cold day as near as I can remember. I started from home when I went to Parker's barn. I had then driven, perhaps, three-quarters of a mile to get to Parker's barn. Taking it the way I went I live nearer than a mile and three-quarters from the crossing. I went for Mr. Manning and he was not at home, and so I drove down to Mr. Parker's. I did not start for there or any other particular place, only just to stir my horse, because it was cold. I didn't want him to stand to wait for Manning to return. When I came back to Mr. Manning's he was at home. He lived between the barn and the crossing. I don't know but the horse would have stood just as well at the barn as he would anywhere, as far as that was concerned, and he would have stood that cold day if he was hitched. After picking Mr. Manning up I started on the west side of the road to go to my uncle's, Mr. Burns. He lived about a mile and three-quarters from the crossing, perhaps, towards St. Paul. I can't tell how fast we drove after leaving the barn. I knew, of course, that I was driving along somewhat parallel with the railroad track. I also knew where the crossing was. I had a hat on my head, a slouch soft hat. I had ear muffs on my ears. They were velvet ear muffs, with an elastic in them. That was all I had on my head. When approaching this crossing from Parker's barn when I got to
the depot, I believe it is a little less than seventy
72 rods by the railroad to the crossing. I think it would not be
much farther by the road. This warehouse is five or six rods from the depot. The wheat house is on the west side of the track. The depot is between the side track and the main track. When I was opposite that house I might have been about 64 rods from the crossing. This road runs over a sandy country. It is comparatively a level country. On the west side of the track there is a farm. It

goes clear down to the crossing. I could not tell how near I was driving to that fence. I presume I had been over that road before that winter, but I don't remember where the road did run at that time. I guess the distance from the fence on the west side to the track opposite the wheat house is perhaps one hundred feet. It is a good deal wider than an ordinary road. As it comes down towards the crossing the fence rather narrows in, so that the space of the wagon road would become narrowed as you get to the crossing. I can't tell anything about what particular part of the road I was driving on, whether near the fence or near the railroad. Coming up the main road at a point 650 feet from the crossing, if I had looked around and there had been a train coming along the railroad I could have seen it from that point perhaps three-quarters of a mile. Proceeding still farther to a point 450 feet from the crossing, if I had looked back then, and the train was this side of the depot, I could have seen it, otherwise not. Going on still further towards the crossing to a point 270 feet from the crossing and looking back,
73 that would have the same effect; we could see at the depot; on
looking back we could have seen that train if it had been this side of the depot. As we approached the crossing we still got nearer and nearer to the railroad until it kind of took a turn and went over. When I got about one hundred feet from the crossing, to give a rough guess I might have been fifty feet from the track. When I got about one hundred feet from the crossing if I had looked back to see if there was a train coming my vision would still go back as far as the depot. It would not go any further. I couldn't see a train behind the depot, but I am confident at one hundred feet, two hundred, three hundred, four hundred, and six hundred feet I could see a train clear back at the depot.

It was on Sunday I was driving along there. In driving along there that day, if the train had been this side of the depot, if we had looked back we could have seen it of course. We might have seen it perhaps at the side of the depot. I was driving the team. I don't know whether Manning looked or not. I don't know whether I heard the train coming or not. I don't know whether I heard the whistle or the bell or anything. That horse was eight years old when I got him about this time last summer. At least that is what they told me. That is all I know about it. I am not a judge of a horse's age. I cannot tell whether the horse got a little unmanageable or not. I can't tell whether the train struck me or I struck the train, that is, whether the train had the crossing and I ran
74 into the locomotive, or whether I had the crossing and the
train run into me. I don't know anything about it. They tell me that the horse and cutter and everything were found on the same side we were going on, that is, on the west side of the track. I know there were trains running on that road on Sunday. I knew it previous to that. This accident occurred about four o'clock in the afternoon; I should think it was a bright day. The wind was blowing very hard, as near as I could remember. I couldn't say whether the sun was shining. I could not say that there were more than two trains running on that road on Sundays, because I never

lived in sight of the railroad track. I know there was two regular trains, one Sunday evening and one Sunday morning. I don't know anything about their running special trains whenever there was occasion. I knew the time of the regular passenger trains; one was in the evening and one was in the morning. I know they have run freight trains there on Sunday. I don't know whether there is any regular Sunday freight train. I knew previous to this accident that they had run freight trains there on Sunday. I have seen them. I knew that they had run there frequently on Sundays.

Q. There had been a good deal of detention and blockading of railroads just about this time, had there not, on account of snow?

A. It has been a bad winter; yes, sir. I could not tell whether they were in the middle or the commencement or the wind-up of the blockades. I should think this was during the blockade. 75 We had a bad winter. I could not say whether the trains had been very irregular on that account. I did not take any paper at that time, and did not know that fact from any source. I did not hear it talked about among my neighbors particularly, not on this river division. I can't say that I had not heard about this time that there was great trouble on the railroads, and great detentions and irregularity in the trains all over the country. I will not swear that I had not heard a word about it; I don't think I had. I don't recollect that I kept up with the current news of the day, as well any of my neighbors. I didn't take any paper at all. I crossed this track at that or some other point in the neighborhood perhaps once or twice a month. At the point of the crossing there is now a sign-board telling people to lookout for the cars. I could not swear that there was then. I should think there was. I could not tell which way it does show. There is a sign-boad at the crossing intended to warn people. I could not tell for certain what that sign-board says. On sign-boards generally it says, "Lookout for the Cars." I think there is a sign-board there. If there had been one there, as I was driving along, there would have been no difficulty in my seeing it, unless I was snow-blinded. The wind was blowing very hard, but it would not have given me any information, because I knew the crossing was there just as well without it as with it.

Redirect examination:

The wind was blowing from the crossing towards the depot. 76 It was in our faces. I don't remember ever seeing a passenger train go by that station at Newport without stopping. I don't know how it was about freight trains, but I don't remember so that I could place it that I ever saw a freight train go through there without stopping; still they might; I can't say positively. I frequently saw trains, both passenger and freight, stop there.

Recross-examination:

I mean to say that I don't remember of ever seeing passenger trains come along there without stopping. I cannot say that it did not occur. I don't remember of any freight trains passing there without stopping. I have not seen trains stop at that depot very frequently. Before the accident I was not at the depot as often as once a month, I don't think. I lived, perhaps, nearly a mile from the depot. I could not see the depot from my place. Houses and timber intervened between. My business was in the mill generally, so that I did not pay particular attention.

HENRY C. MONROE, a witness sworn and examined on behalf of the plaintiff, testified:

Direct examination by Mr. PIERCE:

I live in Newport, in Washington county. My business is farming. I live a little over a hundred rods from the railroad depot at Newport. I understand that depot to be a regular stopping place for trains on that road. It is a place where considerable business is transacted. Newport is a village, and this is the depot for
77 that village. There is a highway running through the village of Newport past the depot building and warehouse, parallel with the railroad and across it at the point where the accident happened. It is a public highway. It has been used as such a great many years; about twenty years or such a matter. There is a great deal of travel on it. It is the main road to St. Paul for that quarter and all beyond it. I have lived there nearly twenty years. I am acquainted with Mr. Schofield. I have known him ten or twelve years, perhaps fifteen. I recollect this occasion of this injury to him and the place where it happened. I recollect of seeing him on that day. I was a witness of the accident. I was passing down the road going from St. Paul to Hastings, on the St. Paul and Hastings road. I had been up to a neighbor's this side of the crossing, and was going home. I met Mr. Schofield and Mr. Manning in the road a short distace from the depot. I stopped and talked with them. Schofield is the plaintiff here, and Manning is the one that was killed. When we left them they passed on towards the crossing, and I started to go home. Soon after I left them I heard the train whistle. George Crawshaw was with me. I looked up and saw a passenger train coming very fast. I says to Crawshaw like this: "For God's sake look at that train come," and we both stopped to watch the train, it was going so fast. We were walking before we saw the train. When we saw the train we stopped and looked at it. We were afoot, and we watched the train until it passed by us and the station, and there was no prospect
78 of its stopping, and that called our attention to Schofield and Manning. We looked out for them then, and the first sight at them I thought they were standing still, but I discovered right away that they were moving yet. I should think the horse must be walking until they commenced to make the turn here to go across the crossing. When they got very near the crossing the horse gave a spring and the train struck them and away they went. Since this accident I assisted in chaining off the ground and ascertaining the distance and the location. I don't recollect the name of the man that assisted me.

EDWARD GEORGE, sworn as a witness for the plaintiff, testified as follows:

Direct examination by Mr. PIERCE:

I have had some experience as a surveyor and civil engineer for the past two summers, in an engineer corps for the St. Paul and Sioux City Railroad Company. I understand the manner of taking measurements by the chain and ascertaining distances correctly. I made a measurement of the premises in the vicinity of the depot buildings and the grounds at Newport, at the place of this accident. Mr. Monroe assisted me. I made memoranda of my measurement so as to make a plat of it correctly (plat handed witness by plaintiff's counsel). I assisted in having this plat drawn correctly, ac-
79 cording to my memoranda as to distances and points. It is correct according to my measurement. (By consent, plat mentioned and produced by witness was introduced in evidence, and is hereto attached, marked Exhibit "A.")

HENRY C. MONROE, recalled for the plaintiff, testified as follows:

When we met Mr. Schofield and Mr. Manning I was going in the direction of Hastings, and I met them going towards St. Paul, or rather at that time, towards this depot building (witness points out on the plat the point where they stood when they first saw the train). When I assisted in making this plat I was able to designate where the spot was that we met them. I gave that point to the surveyor at the time, and had the distances run by chain. That point is 280 feet from the railroad track in a short line. When we got as far as this line (witness indicates on the plat) we heard the train whistle in Willoughby's field. That would be 4,300 feet from the crossing. We measured that. We heard the whistle there. We looked up and saw the train coming. The whistling was what called our attention to it. The wind was blowing. As soon as we heard the whistle we looked up. There was a whistling post at that place. They call it a signal for the station, the Newport Station. The wind was in the north, blowing from us. It was blowing down the river, blowing the sound from us. We saw the train right after we heard the whistle, as soon as we looked up. When we saw the train it was going from Willoughby's field down the road. It was
80 up at the crossing there. It was coming pretty fast. I have seen passenger trains pass there every day. I have no way of knowing how fast they go. This train was going a great deal faster than usual, more than twice as fast. I was led to notice it because it was going so fast. When the train passed up here, and we saw it was not going to stop at the station, I turned around to look for Schofield. The thought struck me then that they must be somewhere near the crossing. I don't think they slackened their speed at all as they came to the depot. I could not swear positively, but I don't think they slackened at all. I noticed them pass the depot. They did not slacken at all. As it went from the depot down past this way it still went fast—a great deal faster than usual. It seemed to keep the same speed all the way. I was at a point to hear any

whistle or alarm of the bell, if any had been sounded. After passing Willoughby's field I did not hear any whistle at all. There was no whistle sounded. If there had been I should have heard it. I couldn't help it. I heard a bell ring when they were passing the switch here at this point—witness indicates: Here is the station; when they were passing this switch—there is a section house there—they were ringing the bell. I did not hear any bell ring after they reached the depot, and after they passed it. I was where I could have heard a bell if they had rung it. The wind would be blowing towards me after they passed the depot. If there had been any ringing of the bell or any whistling after they passed the depot my situation was such as to make it a matter easy for me to hear. After the train passed the depot here my attention was attracted to the boys.
81 I saw the whole of the train pass the depot. It went so quick you could hardly tell which end went by first, or which end you saw or didn't see. At the time I saw it passing the depot, the point at which I saw Mr. Schofield and his companion was right here close to the crossing. They seemed to be going slow then. I have, since the occurrence, located the point where I saw the horse jump. I did that by sending a man up there with a horse and buggy. I stood where we stood at that time, and when they got where Schofield was, in the winter at the time, we stopped the team there. I then went up there and measured. I could see whether that was where they were in the winter. All the way I have of explaining that is, that it is very narrow here near the crossing. The fence runs up here. The turn is getting short as you get on the track. The road runs close to the fence until it came near the track, and then it turns close to the track—and just after the horse turned he made a spring. I saw where the horse jumped. He was making the turn when he made the spring. When he was making the turn he seemed to jump ahead. There is no turn in the road until you come to that point of turning to cross the track, so that, by that means, I could tell just where it was, and I ascertained the difference then by measuring. The distance was six or seven feet from the horse's forward feet to the railroad. It was there that he made the leap. At the time he made the leap the train was very close. I could not tell exactly how close, because I couldn't get the train there again to measure it, but it was very close. It was all done so quick—(witness indicates by striking his hands together suddenly.) It struck him and the snow
82 flew. The train must have been right on them. After the accident I went to the place where it happened. I went back there as fast as I could run. When I got back there I found Schofield and Manning there, and the conductor. The train stopped down in the field, and then some of them got off and came back, and they were there at the point before I was. I could not swear positively how far below the place of accident it was that the train stopped, but it was something like a third of a mile. When we got there Manning was dead or nearly dead; he breathed after that. His body was right close to the track, on the same side of the track they were on before they crossed it. I measured the distance that the body was from the place of crossing, where the accident hap-

pened; it was thirty-four feet. It was lying near the track. The horse was dead. The body of the horse was found at a distance of 133 feet from the center of the crossing. The fence came up to the cattle-guard; it was a post and board fence; they were cedar posts. The horse had struck the fence and broke the post off, and he was thrown 133 feet from the crossing. The post is 91 feet from the crossing. I took that measurement, and that is correct. I am familiar with the situation of the ground in the vicinity of the crossing. With reference to the excavations marked on the plat, these are holes dug along beside the railroad track on both sides. It is where they have taken the dirt out to fix the railroad, thus making the point of approach to the railroad narrow. The distance from the center of the crossing to the largest excavation marked on the plat is 19 feet. From the crossing to the post with the sign 83 "Look out for the cars" the distance is 21 feet. That is a correct measurement. There was a good deal of snow in the road at that time. These holes were level then with snow. It was not so that any one could drive into those excavations, on account of the snow being packed down. I think there was only one approach to the railroad through the snow broken and used at that time; I am sure of that. There was a chance of turning off that one track. As you approached the crossing, you could turn off anywhere. You could turn off at a point something like 25 feet from the track, but you could not turn off without going into a kind of hole there. On the right of the road there was a smaller hole. There were no snow-banks there. The snow was deep in February. There was plenty of snow.

Court adjourned to 9 o'clock a. m.

HENRY C. MONROE recalled as a witness for the plaintiff, testified:

Mr. Schofield was right where he fell, when I got there, about 8 or 10 feet from the railroad track, I suppose. He was sitting up in the snow. I don't think they were ringing at the time they got to the station. The space between the fence and the railroad track was all open to travel in the summer time. There were no fences there. If there was any obstruction to travelling there in the winter time, it would be the obstruction of the snow. There were oak trees along between the crossing and the depot building. Some of them are a foot and a half or two feet through; they are not of that kind of oak that carry their leaves during the winter—not all of them. 84 there were one or two black oaks along there that had their leaves on. The most of them were burr oaks. 33 feet from the railroad track at the crossing you see a train past the depot. When you come to a point within 33 feet of the crossing you are at a point where you can look towards and past the depot building beyond and see an approaching train when it passes the building here. Witness indicates. As you approach the crossing from the depot building on the highway I think you could discover an approaching train before it gets to the depot. There is a place something like 20 feet from the track that you can see the train

600 feet. From that 600 feet point you can see the track to the curve, but not beyond. It is 2,320 from the crossing to where the curve commences. Mr. George and I made those figures ourselves. I have been in the habit of travelling that road. There is a space of 600 feet after you pass the warehouse that you cannot see a train until you get within 33 feet of the crossing. From this 600 feet point, if you go south, you can see the train farther; if you go north, you cannot see it ail for 600 feet. Then if you start from the south end of that 600 feet and go south you can see the train nearly all the time. These persons were riding in a low cutter. It is not as high as a wag*g*on or a man's head. The railroad track is elevated somewhat above the level at the crossing. I should think it was elevated some three or four feet. I am not positive about that. A person in approaching the crossing would have to make a
85 rise to get on to the crossing. The platform at the depot
extends within three feet of the track. It is a passenger platform. It is about three feet high, I should judge. I should think a person sitting in a cutter 33 feet from the crossing could see over the platform at the depot. I never tried that. He would have to be within 33 feet of the crossing to see it anyway. He would have to be that near in order to be out of the observation of the depot itself. I think he could see over that platform, but I don't know. From the station to the crossing it is level, or nearly so. There is not very much down grade from the depot to the crossing, if any. Beyond the depot, where the whistle blew, it is very nearly level all the way there. It may be a little declining there. This cedar post that I say was broken it was a sound post. It was five by seven inches in size. It had been broken off by something. I would not swear it was broken by the horse. The horse was lying beyond the post, and, of course, we all said it was broken off by the horse. After this accident happened I heard the whistle for down brakes, I think.

Cross-examination by Mr. FLANDRAU:

Starting at a point 1,070 feet from the crossing, the trail that the cutter went on in the winter the distance from the fence varied. Some of the time it was ten or twelve feet from the fence, and sometimes more. That was on account of the drafts. There was one travelled trail at this time. It was a well-defined trail, and went
86 across the crossing and over on the other side. It was one of
these snow trails with a hump in the middle. At a point 650 feet from the crossing if he had looked back, and the train had passed the depot, he could have seen it, but no further. I can't swear that the distance is 650 feet, but I know you can see a train after it passes the station somewhere about this point. If a man goes right straight along from there towards the crossing, if he should look back I don't think there is any point that he could not see the train after it reaches the depot. I think it is an open view clear back to the depot. From the depot to the crossing is about 70 rods. 270 feet from the depot, if the tangent is correct, it would take the range of vision to a point beyond the depot where you could see a train. I was nearly opposite of the section-house when the train passed by.

We met the men some distance this side of that. We were at a point back of the depot nearest Hastings when we met the men, and they drove quietly on, and we walked on towards Hastings. When we heard the train come we turned around and noticed the train as it got to the depot. Then I thought of these people and turned around to look, and they were going slowly along. They were away up here (indicates) when the train was at the depot, and I say that at any of these points, if they had looked back, they could have seen the train when it got to the depot. At the first sight they
seemed to me to have stopped, because I was looking right at
87 the rear of them. I discovered immediately that they were
in motion. I saw them going quietly on until they got within seven feet, and then I saw the horse jump, and it took them right against the locomotive. The horse jumped partly in front of the locomotive.

I say I heard the whistle in Willoughby's field. That was the first I heard. I can't tell what kind of a whistle it was. I only barely heard it, the wind was blowing so hard. I don't recollect whether it was a long or short whistle, but I recollect it was enough to attract our attention. As the train went along I heard the bell ring, and I heard it ringing up to a point until it got nearly to the depot, and then I did not hear it any more. When the train got to the depot then I began to think of these men, and then my attention was diverted from the train to these men. I don't think that fact would have prevented my recollecting whether I heard the bell or not. I don't think the bell could have gone on ringing and I not have heard it. At the time I turned around and the train got to the depot I was something like 25 or 30 rods from it. As the locomotive passed the depot it brought the depot between me and it. That would have obstructed the sound somewhat, but not enough so but what we could hear it, with the wind in the direction that we went, so we could not help but hear it. I was sworn upon the coro-
ner's inquest. I suppose I was questioned at the inquest
88 as to the ringing of that bell. I am not certain. The
inquest was held at Hastings on the body of Manning. I never said any such thing as that the bell was rung as they approached the crossing, or that I could not tell whether they rung the bell until they approached the crossing or not. I guess the coronor took minutes of the testimony. I don't know anything about what he wrote. I swear that I did not testify to that state of things. I say I live in that neighborhood. At the time of the accident, and previous to it, for some time there had been along the lines of railroads generally a snow blockade, and the trains had been irregular. There was a second train following the first one. It came along in a very few minutes after this one. They were both of them passenger trains. I cannot tell whether the second train stopped at the depot or not. I had got up to where the accident was at this time, and paid no attention to that train until it came up to where we were. When I got up to the crossing a man came back with a flag to stop them. I mean to say that I got to the place of the accident before the second train arrived. I was something like 110 rods

from the accident where it occurred. I ran all the way up there. I cannot tell the hight of a car above the ground. I should think a car was ten feet anyway. The smoke-stack of an engine would be four or five feet above that, or something like that. I don't think the platform would obstruct the view of a train at the depot, the train would be so much higher than the platform; I say the train was coming pretty fast. I don't think it slowed up any when
89 it approached the depot. I did not appear to me to slow up at all. I did not count the cars on the first train, could not tell how many there were. I think it was about a common passenger train of seven or eight cars. A train of that nature makes some noise. It appeared to me that this train was going rather still, stiller than they do sometimes. It appeared to me that the engine was not at work at all; that the steam was shut off; it looked that way. It was level at that point. All the way behind it was coming down a heavy grade. I said at the time of it that I thought it was running forty or forty-five miles an hour. It had just got down the hill.

I don't suppose the rumbling of a train is any less when the steam is shut off, but the noise is less when it is working and when it a'nt. As a general thing when the wind is not blowing very hard against it you can hear it coming for a mile and a half before they make their appearance. If the wind is not right you can't hear it. In my judgment I should think that that train must have gone about a third of a mile past the crossing before it stopped, perhaps more, perhaps less. I heard the call for down brakes. They generally give two short whistles. I think I heard those.

Redirect examination:

I can't tell exactly from what distance the down grade extends towards the depot. I never measured it, but it is behind the section house something like 300 feet from the station. There is a level place where they pass by the station until they strike that place. It is a heavy down grade, and they were coming down grade.
90 My understanding is that they had cut off steam on account of the impetus that the train had already acquired, and that carried it forward at the same speed.

Recross-examination:

I did not say I was sure I heard that whistle for brakes; I say I think I heard it. I think they gave the usual signal on this occasion. From the distance they had passed the place of the accident I think it was a third of a mile that I heard the whistle for brakes. They generally whistle a little before they stop. They have got the brakes so they stop pretty quick now. The whistle in Willoughby's field was a long whistle. The next whistles I heard, I think, was two short whistles. When I heard that the train was the third of a mile or so after they had passed the crossing. It is impossible that I am mistaken as to the locality where I heard these whistles. I feel pretty confident I heard the two short whistles as well as the first. I don't know whether they whistle for brakes now or not; I think they whistle the same for brakes now with air brakes as they did before they had them. The conductor can apply the air brakes sometimes; I do't know who applied them. I don't know whether the engineer would whistle for them if he applies them or not. I don't know anything about that. Those whistles were not for the crossing. They were far beyond the crossing.

Redirect examination:

91 It was after the accident that I heard these whistles for down brakes. It was very quick after I saw the cutter moving slowly along the highway and saw the train approaching that the collision took place. I could not tell how long it was, but it was very quick. I saw the horse at the place after he was struck. He was struck in the side in the forward part of him, and the side of his head was smashed in. He was struck in the ribs and fore-shoulders, and his head was stove in. I saw the cutter. The box and seat was thrown off at the side near were the men were. The balance of the cutter was still hitched to the horse. The body of Manning lay 34 feet this way from the crossing. Schofield was 66 feet from the crossing when we found him, and at least eight feet from the track. All of the wreck of the accident was on the west side of the track, the men, cutter, horse, and everything.

George Croshaw, sworn and examined as a witness for the plaintiff, testified as follows:

Direct examination by Mr. Pierce:

I was with the last witness on the stand when I met Mr. Schofield and his friend in the cutter. When we met them they were, I should think, about twenty or more rods from the depot. It was a little below the depot. We talked with them just a few words, and then they started up and we turned around. I could not say that
92 they started off faster than a walk. I paid no attention to how they started. Then we walked along down the wagon road along the sleigh track. After we had gone a short distance I heard a whistle, and looked around and saw the train coming. That whistle I heard was in Willoughby's field. It was not very distinct. The next I saw was the train. I think the baggage car was on the rear of the train. It was going pretty fast. I am in the habit of seeing trains on that road frequently. It was going a great deal faster than usual. I could not say just what the usual rate of speed is, but I should say that passenger trains run pretty fast on that road.

Passenger trains usually stop at the depot—most all passenger trains stop at the depot, so far as I ever made any observations. There a great many freight trains pass by without stopping. I should say that this train was running nearly as fast again as usual. By usual rate of speed I mean when running away from the depot. I have no way of indicating the speed except by observation. I made no observation on this occasion, more than what time I should judge they were running from the time they came in sight to the

time they passed the depot. It was very quick. I could not say they slackened up at the depot a bit. I could not see any slacking. As soon as they passed the depot I looked for Schofield and his friend. I turned around to see were Schofield and Manning were. I saw them. The first glance I thought they were standing still, very near the track, on the turn, or very near the turn, and the second glance I thought they were moving. That instant the horse sprang and
the snow flew, and the train passed by. I afterwards ascer-
93 tained the point of that turn, where I saw the horse make
that spring. I did so by measurement. I found the distance from the track to be seven feet. I am acquainted with that particular locality. I have been over it a good many times. In order to turn out at that point they would have had to run into the deep snow. I noticed a deep excavation there. I should judge it was five feet below the railroad level—not more than three feet below the wagon track. It was full of snow. I supposed at the first glance that the cutter was standing still, but looking right from me in that direction I might have been mistaken. I think the horse moved forward before he jumped. It was a very short time after my first sight of them before the accident occurred. It was almost instantaneous. I have heard the testimony of the plaintiff and the last witnesses. They would have to get within 33 feet of the track before they could see a train beyond the depot. I made an actual observation of approaching trains in order to ascertain that fact, and saw the distance measured. I don't recollect of hearing any whistle blown after this one in Willoughby's field. I don't recollect of hearing the bell after they passed the depot. The best of my belief is I did not hear it. I state that from my remembrance. The way the wind was blowing I should think there would be no difficulty in hearing it if it had been rung.

When we got to the place of the accident, after it had happened, some of the train men were there. Manning lay on his back, with
his head towards the track. I should not think his head was
94 more than two feet from the track. Maybe three. There
was a measurement taken of the distance he lay from the crossing, but I did not take any. I should judge it was somewhere about thirty feet. I saw the horse. He lay near the cattle guard. I saw the fence had been broken down. It was a fresh break. The horse was lying beyond that point. I should judge the horse had been thrown through that break and caused it. I did not notice the place where the horse seemed to have been struck. I did not examine the horse. Schofield sat in the snow quite a distance beyond Manning. I should think he was not less than eight feet from the track. He was sitting up in the snow when I found him, and seemed to be in great pain. There was nobody with him when I first saw him, but there was soon plenty around him. He complained of great pain in his shoulder and hip and foot. I was 280 feet from the railroad track—perhaps thirty or thirty-five rods from the depot, when that bell was rung. I could not state to a foot just when the bell commenced ringing. I can state that I did not hear it ringing after it passed the depot.

There are other obstructions to the view besides the depot. After you get down the waggon road from the track at this point of 33 feet the trees help obstruct the view of incoming trains from the south. There is one tree and a telegraph pole that you have to look between. The tree I speak of is one near the main track, and not far from the warehouse.

Cross-examination:

Trains that stop at this depot coming from the direction of
95 Hastings always slow up before they reach the depot. I
mean to say that this train was twice as fast as it usually goes when going at full speed through the country; that is my idea of it. As far as my observation goes, they run pretty fast on that road; from twenty to twenty-five miles an hour, perhaps, is the usual rate of speed. I think that is the usual rate of express trains. I think this train was going fifty miles an hour. I never timed a train. I have no data to determine whether they were going thirty or fifty miles an hour. I never saw any one else time a train. I have not made any calculation of the time it takes to run from one station to another, and of the distance run. I have no basis to form a judgment, except just what my eye got at this moment.

I suppose that these gentlemen in this cutter driving along down after they had the conversation with us could have stopped anywhere along in the road by simply pulling up and saying "Whoa!" I know of no reason why they couldn't. After they had got within 600 feet of the crossing, if they had turned around and looked back, I think they could have seen a train at the depot. If there had been a train there, with the engine past the station, they could have seen it. That station-house, I understand, is over 70 rods from the crossing. When they got within 33 feet of the crossing, if they had looked back, they could have seen a train coming away back of the curve, a distance of 2,320 feet from crossing.

I have driven horses some. My business is day laborer. I have
driven and handled teams. There was no more difficulty that
96 I know of in stopping that horse in that last 33 feet, if they
had looked back and had seen the train coming, than there would have been in any other thirty feet of the road. The track was an ordinary smooth track, made by horses going over it, and pretty much on a level.

Q. Now, if they had looked back at any point on that 600 feet from the crossing and had seen this train coming, and had stopped their horse and waited for it, the train would have gone by, and the men would have been alive to-day, wouldn't they?

A. They would, if they had stopped back of that 600 feet; you could not see the train 100 feet from the crossing.

Q. Couldn't they see the train after it passed the depot?

A. Yes, sir; but I understand you now.

Q. I say, anywhere along that 600 feet, if they had simply looked back and a train had its nose ahead of that station, and they had seen it and stopped, the train would have gone by, and the men would have been saved.

A. Yes, sir; if they had seen it at that time.

Q. Now, did you see anything that looked like a horse running away, or anything except this leap he made within seven feet of the track?

A. I did not, sir; I cannot say that the horse was unmanag-able, or that there was any difficulty at all.

When I got down to the place of the accident I asked the pl'ff how bad he was hurt and how he felt—some such questions. He kept continually complaining of his shoulder, his hip, and his foot; he did not say anything about his horse running away with him; he did not undertake to give any explanation of the accident at all.

97 It was winter time when this occurred. Those trees shown on the plaintiff's map I don't think were in full leaf at that season of the year. A telegraph pole is not a very heavy obstruction to cut off the sight of a train. The trunk of this tree I mentioned might be 15 or 16 inches in diameter; the telegraph pole, I suppose, about 10 inches. Those obstructions were not very heavy.

Redirect examination:

From actual experiment, I find that the trunk of that tree and that telegraph pole have a tendency to obstruct my view of a train. When you look right straight at a tree you can't see just beyond it. The warehouse and the tree together affect the view to a considerable extent until you get almost on to the track.

I had never seen a train run so fast on that road up to this time, and I would not say that I ever did. I had seen a good many trains on that road previous to that.

Isaac E. Trevette, sworn and examined as a witness for the plaintiff, testified as follows:

Direct examination by Mr. Pierce:

I live in Newport, Washington county; my business at present is gardening; I have lived where I do now for nine or ten years; I live, I think, about 70 or 80 rods from the depot; it is a little west of south.

98 I recollect the occasion of this accident, and of the approach of the train that caused it. I had been informid that there would be a train that afternoon about half past four. I got the information from the operator, Mr. Cone; he told me there was a train expected that afternoon. I knew that there had been no trains for a couple of days, or thereabouts; I think from the morning before. I had been informed there was a smash-up, or something; either a break in the road, or a train off the track, or snow bound, or something the matter below with the trains that they had not run for a day or two. I saw this train; I was standing in front of my house; my house is between three or four hundred feet from the track west, and on the east side of this wagon road. I guess it is a county road.

The first intimation I had of the approach of the train I was com-

ing from towards the stable to the house, near or in front of the house. I heard the whistle; I looked and the train was in Mr. Willoughby's field, so-called, before it had crossed the Parker crossing. It was between the Cottage Grove crossing and the Parker crossing, in Mr. Willoughby's field. I never measured the distance, but I should think it was two-thirds or three-quarters of a mile from the depot. I then saw the train. At the coroner's inquest I said that I was satisfied the train was going at the rate of thirty miles an hour. I wished to put it within bounds. I must say it was going faster than I had seen trains coming in that way, and it drew my attention on
that account. I watched the train until it passed the depot,
99 until the rear end passed; I stood and looked at it, as I often
do at trains passing, and then turned and saw no more of it. I don't think I have ever seen a passenger train or any other train going at greater speed than that was. I never saw one move as fast as that did. I have seen passenger trains there that did not stop. This train seemed to be going, I thought, twice as fast as the usual trains. From the point where I first saw the train in Willoughby's field I think the grade is down. I think it is down hill from the Cottage Grove crossing until near the switch. That is a distance of fully half a mile, I should say; the only whistle I heard was the one in Willoughby's field. I am not positive that I heard the bell ring; my opinion is I did not hear the bell ring; I was within four hundred feet of the track at the time the train passed; I think I could have heard the bell if it had been rung. I have often heard the bells ring at the time it gets up to the depot. I think it is not a common thing for them to ring the bells when they don't stop at the station, freight trains or others. I have seen trains pass without whistling.

This day was a very cold day; the wind blew quite fresh from the north. After the train had passed me it would have blown the sound of the bell to me if it had been rung, I think. I was on the north and south line. The train was a little east of me until it got to the crossing.

Q. What is the usual time for trains to pass on Sunday?

100 Objected to by defendant's counsel, as irrelevant and immaterial. Objection overruled, and defendant excepted.

A. Five o'clock and, I think, 17 or 20 minutes in the morning, and after eight in the evening. The train going south passed there in the evening. The up train, the one going north in the morning, passed there after five, and before six. This accident occurred after four o'clock. On Sunday, I think, there is no regular train but those two—no passenger trains—the morning and evening train. I think that has been my observation for some time. I think there was no freight trains due at that time. I have seen freight trains pass there on Sunday—gravel trains. I have seen no regular freight trains at that time of the day. I did not see this place of the accident.

Cross-examination:

I have resided in that neighborhood, I think, for 10 years. I am familiar with the lay of the land at the crossing, and the station-house, and with the road that leads to the crossing. I pass it three or four times a week, sometimes oftener.

I think I have seen freight trains pass up the road towards St. Paul on Sunday mornings. I had the impression that I had observed those trains well for years, but I would not swear that there was not three freight trains passing by every Sunday. I am now a
gard-ner. I was not at the time of this accident. It was in
101 the winter time. I have been in the garden and fruit busi-
ness five or six years. My business did not bring me to town
on Sunday; I could tell better as to the number of freight trains on week days. Many times I go to town on the freights; when I don't catch the passenger I have to take the freight.

I think about twenty miles an hour is the usual speed of express trains on that road when there is no occasion to stop, when running at full speed. I have come to St. Paul many times on the morning train, and it has taken from 17 to 20 minutes to come through.

I was sworn on the coroner's investigation. I made this remark there with reference to the speed of that train. I wish to put it within bounds, and I am satisfied it was running at 30 miles an hour. I am certain I testified to that. I don't know that there is any reason that I should remember the speed of that train any better now than I did then. At the time of the accident it was fully as light as it is now, I think. I had no difficulty in seeing what I saw. I think it was a little cloudy at the time, but still it was not really dark. I did not hear any whistle after the one in Willoughby's field. I would not be positive whether I heard any bell or not. I first heard of the accident immediately before the train had left.

I don't know that my attention was attracted to that train any
more when it passed my house than to any train passing
102 under similar circumstances, except that we had had no train
for a day or two, and when I heard the whistle I looked at
the train.

Q. Do you recollect whether that was not in the midst of a snow blockade that had detained the trains?

A. I think I stated that there had been no train up since the morning before—no regular train.

Q. Wasn't that generally known by people about there?

A. I cannot answer for anybody else in regard to that matter. I knew it myself. I knew it because I was personally acquainted with the operator, and he had so stated to me two or three times.

Redirect examination:

I once got caught myself at that crossing. I passed there in the morning very early; I am required to—my business requires me in town to bring vegetables, and I make it a point to leave my place at 3 or half-past 3. Sometimes I am a little belated and don't get started so soon, and I was once or twice caught at that crossing, and was so near caught that I thought I was caught for good. I had no chance to turn out. There is a bad place on each side of the crossing—a deep hole. When one gets into it, it is almost impossible to

get out of it, if he has a fractious horse. Thanks to my ability in getting a good horse—one that was gentle. I did not get killed, nor my horse. I talked to my horse and he stood. I was within twenty feet of the crossing. I had come up from the other way, and did not anticipate any train coming. I usually look for
103 trains, but in this place it is difficult to see a train. When you are from 3 to 20 rods from the crossing it is almost impossible to see a train approaching after it passes the lower switch; I mean the switch south of the depot towards Hastings. I looked for trains from the other side and did not see any. I drove leisurely along, as I usually do through the sand, and got right in there when the train came along.

At that particular time of the year when the accident occurred it would be very difficult for the teams to pass near the track for four or five rods; that is, for two or three rods on each side. One one side there is a hole, and on one side of the wagon track is a hole also. It is dug right up to the wagon track. I think it would be almost impossible to pass two wagons across there in the summer time. At a point 33 feet from the crossing nearest to the depot at that time of the year it would be almost impossible to turn out and turn back again. The only way would be to turn square around and turn back. You couldn't get off either side. The roads run almost parallel with each other there for a long distance, and in approaching this crossing one has to turn almost square back to see if a train is coming. It is a hard matter to get a team turned around there, even in the summer time, at that distance.

After we cross the track coming north there is a fence there. I don't know who put it there, but it is a continuation of the fence along the railroad. It comes right in past the center of the
104 wagon track, and turns square and comes up to the cattle guard. It comes within 26 feet and three inches of the south line of the wagon road. It leaves that much of the wagon road there. The effect of that fence, together with this excavation in the road, is to converge the highway closer and closer to the track. For these reasons it would be very difficult to get out of that place, on the line of the wagon track 33 feet and 22 or 23 feet from the track at right angles. At that point if one stands looking down towards the depot, he can see a train approaching probably 15 or 20 rods. It will come in view beyond the depot. That is my observation in the matter. Farther than that, if you go down the wagon track, you obscure your view—shorten it up—so that when you get down where you strike a line of a freight-house, you can't see the cars beyond the depot at all, and you have got to go still further to see them at the curve beyond, There is quite a distance, I should say 25 to 35 rods that the track is entirely obscured from the depot down—that is, on the wagon road before you come in view of the track south of the depot.

Recross-examination:

It is admitted that from any point on the wagon road 600 feet before reaching the crossing the entire railroad is visible from the crossing to the depot.

If a man was driving along the 600-feet point towards the crossing, if he looked back and saw a train coming after it leaves
105 the depot, and should pull up his horse and stop, I don't
think there would be any difficulty for the train to pass him and he go along behind it.

Q. You speak of some difficulties in excavations and matters about the crossing within 33 feet of it?

A. Below the crossing.

Q. And you said it would be difficult to turn around there when you were within a short distance of the crossing, say about 30 or 40 feet?

A. Yes, sir.

Q. Suppose a man was even at that point and a train was coming, and he should look and see it, wouldn't it be perfectly safe for him to pull up and stop there?

A. Yes, sir; if he had a horse that he could depend upon; it would be for me; if I knew my horse I would.

Q. You wouldn't undertake to turn around there, would you?

A. I should certainly do the best I could to give him a free chance to go; I don't think I would undertake to drive onto the track in that distance.

Q. If you had a good tame horse as this one has been described to be, 8 or 9 years old, nothing fractious about him, and you looked back and saw a train coming, and you stopped your horse and let the train go by when you were within 30 or 40 feet of the train,
what danger would there be?

106 A. I don't know that there would be any; I don't think I
would try the experiment of whipping up and trying to beat the train; I don't know anything about whether this plaintiff ran into the engine or whether the engine ran into him.

Gilbert M. Bigelow, a witness sworn and examined on the part of the plaintiff, testified as follows:

Direct examination, by Mr. Peirce:

At the time of the accident I resided in Newport, Washington county. I had lived there nine years. I never have measured the distance of my house from the depot, but I should judge it is about 80 rods—may be more. It is south of the depot. My house sets about 12 rods from the railroad fence.

With reference to this train. It was on Sunday, and I was doing my chores. I have only one cow to take care of, and I was out to put her in the barn, and was going out to get some hay to give her, and I heard a train as I was leaving the stable door. I heard it whistle south of me, and my not knowing there was a train coming I stepped out and walked towards the barn-yard bars towards my house to see what time it was, and when I got there there was no train. I saw no train, but heard the rumbling as it passed back of my barn towards the depot north, and then I stepped out so that

I could see past an old stable with a straw roof on it, so I
107 could see it pass that up to the depot. I saw the rear end of the
car as it was passing out of sight past the depot coming towards St. Paul. I new nothing of anything that had happened or was going to happen. I then went back. I got up on the shed and got my fodder for the cow, and gave it to her. I put the cow in and then went and started for the house. I got out of the bars and went up on a snow-drift about four feet high to get to the house, and my attention was drawn then by another whistle. Well, I loooked around and I saw that was a train coming, and I thought no more of it, and I started to go to the house, and I heard one of my neighboring women, Mrs. Trescott, say "There must be somebody hurt."

As soon as I heard the first whistle I stepped right out of my barn to see the train. I walked about thirty feet. I neither ran or walked slow. I don't think it took me more than half a mintue. During that time the train had came within hearing and passed the place, and was just passing the depot. I did not hear any bell. I heard no more whistling and no more ringing of bells after I heard that whistle in Willoughby's field for the depot. I did not hear them ring a bell at all. I hear the bells most every time a train passes when they do ring.

From what I saw I thought that train was going a pretty good rate, for I have frequently heard trains whistle that was, as I thought,
regular trains. I thought it was going a good deal faster
108 than they did, because I have been before and got the same
distance, and have seen the whole train as they passed, and I thought by that she was running a great deal faster than they generally ran.

Cross-examination:

I am speaking of general trains coming in and stopping at the depot. They generally brake then. There is an exhaust of steam put on just about my house there or against the culvert. The train does not seem to slack up any until she gets pretty near the switch. Then I can see a slackening in the motion generally. I think this train was going faster than those trains by what observation I had of it. It did not stop at the depot. I usually hear the bell. I did not on this occasion. The wind was blowing from the north. I had no interest in that train; was merely a casual observer. I don't pretend to say that the bell was not rung. There was a second train. I heard no whistle from the first train after it whistled, as I supposed, in the Willoughby field, but I did not see the train until it was going by the depot, the rear end of the hind car.

I was sworn before the coroner's jury. I swore there that I was just stepping out of my stable, and that I went from there to the bars, and the train had gone. I then stepped two or three paces to the west to look by the straw-shed, and the rear end of the cars was passing the station. That was what I swore to then. I did not swear that I was in the stable, and did not hear the signal or anything of the kind.

109 **Levi Bailey**, sworn and examined on behalf of the plaintiff, testified as follows:

Direct examination:

I live about a mile and a half this side of Langdon, about 4 miles I should think below Newport. I was living there at the time this train caused the accident. I saw the train as it approached Newport from my place. I was probably 80 to 100 feet from the train. I was in my dairy room, and I saw the train coming, and it attracted my attention by the speed at which it was going, and I ran out for to see it; and I think it was going a great deal faster than it ordinarily does. I won't state how fast it was going, but it was going a great deal faster than the usual speed of the trains. It would be a very hard question to answer as to the proportion of speed it was running at, but it might possibly be going twice as fast as it ordinarily runs, and it might not; I can't say. I know it was going a great deal faster than it usually runs, and I remarked to my wife that I pitied anything that came in contact with that train. I thought so at the time, and remarked it to my wife. This was on a level place. I think I never saw a train run on that road any more rapidly or as rapidly. They can run by our place about as fast as any place on the road I should think, for I think there is about three miles on a straight line. It is a good run there. Close
110 by Newport there is a down grade. There is also one in my
field, just coming this way, coming down by the corners, as we call it. I think it is down grade north of my place as we come this way. There is a down grade. I think it is principally down grade from there to the point reaching Newport. I don't think there is any up grade, unless it be right there at the corners.

Cross-examination:

I saw the train that followed this one; they were both going about the same speed, I should think; they were only a few minutes apart.

My business is farming and dairying. My business has never called me to time the trains, and I never have done so; I don't know anything about the usual speed of trains; I don't know how many miles an hour they are making, or anything of the kind; my judgment is that these trains were running a great deal faster than usual; I think there had been a blockade for a while at that time; I am not positive in regard to that special train.

H. A. Durang, sworn and examined as a witness for the plaintiff, testified:

Direct examination:

I am engaged in the milling business; I live at Newport; I am acquainted with the place of crossing where the accident occurred; I was not very familiar with it at the time, only as I looked it over just after the accident; I was not there at the immediate time
111 of the accident; I was there in a very few moments after-
wards, probably half an hour. A short time before this trial I took pains to ascertain the locations and the distance of the points

of observation on that road; I made an actual experiment to test the distances that a person would have to be towards the crossing coming from Newport to see an approaching train beyond the depot, I found that at a point 33 feet from the crossing on the wagon road. and about 20 to 21 feet from the railroad at right angles beyond the 33 feet, was the trees and the depot building, and the station-house, the toll-house, and a little residence that the section man occupied, all helped to make an obstruction to the view of the road. The depot forms an obstructio'. to the view down as far as the curve that is represented on that map, after passing 33 feet from the crossing, and the other buildings cover the road beyond the curve. On account of these buildings beyond them there is an impediment to the view when you are even 33 feet from the crossing. There is a tree there that, of course, helps to cover the same extent. Within 30 feet or such a matter of the crossing there was no opportunity last winter for a man to avoid any accident that should occur, supposing he kept going ahead. There was no opportunity of turning to the right or left. There was no alternative except to stand still or to go ahead and get across the track before the train comes.
112 It was almost impossible at the time to turn around without being capsized or smashig up a man's cutter. The wagon road at the point of crossing was not to exceed in width that of a common path. It was probably about six feet wide. Right on the railroad the track was kept clear by the railroad employés, so that the road was wider on the crossing.

Q. Did the defendant previous to this occurrence make excavations in the highway, and were they existing there at the time of the accident, and this cattle guard also across the track, and the fence constructed to correspond with it so as to obstruct a free passage to that crossing on the highway?

A. There was such obstructirns at that time. They confined us to a certain locality. We were allowed 64 feet, I think, on that road, and the railroad crossing took possession of the highway and made us a crossing but barely wide enough for one team to go there. Perhaps two teams could possibly go. In addition to that there are excavations made on the inside of that farm so as to still more contract the public highway. They were made by the railroad. Those are the excavations I have noticed that are marked on the plat here.

Cross-examination:

When I speak of excavations, I mean where the dirt was taken to make the track—to raise it a little higher. That was done when they were building the road. Something in the neighbor-
113 hood of 16 years ago. I have no knowledge whether or not it was done with the consent of the authorities of the town. That state of things has continued right straight along ever since the building of the road. These ditches do not grow up to weeds much. The men keep them cut down. One of them is quite abrupt. I should judge it is something like 16 feet from the end of ditch to ditch, perhaps more. There is plank between the rails on the cross-

ing. I have seen crossings like that before, but I have sometimes seen them broader for that amount of travel.

A road in the snow of that amount of travel is, I should think, about five feet wide. The whole travel at the time of that accident passed in going from Newport to St. Paul over one beaten track. When that beaten track got within 30 or 40 feet of the railroad it turned and went across, and there was no other track there at that time.

Q. Now, you speak of turning out to avoid danger when you got within a distance of 30 or 40 feet of the track; wouldn't it be the safest thing, if a man was driving that way and saw a train coming, to stand still and let the train go by, would he want to turn around?

The question was objected to, by plaintiff's counsel, as a matter for the jury and not for the witness. The objection was overruled.

114 A. It might have been for them. If I had been in their place I should have tried to turn around towards the track, if I could.

Q. You wouldn't have gone ahead anyhow?

A. No, sir; I should not have gone ahead.

Q. Can you imagine any more dangerous experiment than when you are within that distance of the track and the train coming to have gone ahead?

A. I have used my judgment in a case in my own experience; I have gone ahead several times, and I have gone ahead of the train, and I took my chances, and so far my judgment has always come out ahead.

Redirect examination:

I have had experience in crossing a few times myself; I have lived there about twenty years.

Q. In making the crossing there ordinarily, what, if any, trouble has been experienced in being able to know whether any train was or was not coming; was there any trouble that you experienced in that matter?

Objected to by defendant's counsel, as calling for the opinion of the witness.

Objection sustained.

(Witness indicates on the plat the excavation which constituted the chief difficulty in getting out of the way when a train approached.)

If this excavation had not been there, there would have been no very great amount of snow there—perhaps two feet or such a matter—till we got right close to the fence. This excavation fills with snow from the wind.

115 I stated that I took an observation to determine how far one would have to be from the track to see a train coming. There is a tree that forms an obstruction; I believe it was an oak; I don't know as I remember exactly the size of it; it must have been 12 or 16 inches through; the leaves of those trees along there, I

think, fall during the winter season; the trunk constitutes mostly the obstruction.

The plats produced by both counsel for the plaintiff and the defendant considered in evidence.

The plaintiff here rested, and the foregoing was all of the testimony introduced by him.

Counsel for the defendant then requested the court to charge the jury to find for the defendant, on the ground that the testimony as now disclosed taken to be true, cannot support a recovery against the defendant.

The jury were here discharged until 10 o'clock a. m. on Monday, the 26th day of June, and the counsel for the respective parties proceeded to argue the questions of law presented by the last-named request.

Court having met on the day and hour to which it had adjourned, Judge McCrary announced his decision granting the motion of defendant's counsel, and instructed the jury that in view of the decision of the court and the law of the case it was their duty to
116 find a verdict for the defendant.

The jury thereupon returned a verdict for the defendant, and plaintiff's counsel excepted to the ruling of the court directing a verdict for defendant.

We are satisfied with the foregoing statement of the testimony and proceedings in this case, and consent that it may stand as the plaintiff's bill of exceptions therein. The maps of both parties used on the trial may be used on any future argument of this case, as if part of the bill of exceptions; and the judge's charge or opinion shall also be considered as part hereof.

July 23, 1881.

BIGELOW, FLANDRAU & SQUIRES,
Def't's Attorneys.
PIERCE & CONGDON, *Att'ys for Pl'ff.*

And the plaintiff now prays the court to approve, sign, and allow the foregoing bill of exceptions, which is accordingly done, this 28th day of July, 1881.

GEO. W. McCRARY,
Circuit Judge.

117 Circuit Court of the United States for the District of Minnesota.

WILLIAM A. SCHOFIELD
vs.
THE CHICAGO AND MILWAUKEE AND ST. PAUL R'Y COMPANY.

Defendant's bill of costs and disbursements.

Costs by statute	20 00
Clerk's fees for copy of record for U. S. court	4 60

Witnesses for def't,	T. D. Underwood,	3 days		4 50
	R. H. Wellington,	3 “		4 50
	C. L. Travis,	2 “	20 miles	4 00
	J. S. Coughlin,	2 “	20 “	4 00
	Wallace H. Frank,	2 “	20 “	4 00
	Henry Nichols,	2 “	20 “	4 00
	I. T. Phelps,	2 “	20 “	4 00
	Sim Hedding,	2 “	20 “	4 00
	M. D. Rame,	2 “	20 “	4 00
	J. H. Murphy,	1 “		1 50
	Dr. Quin,	1 “		1 50
Clerk's fees U. S. court to be added				7 85
Sept. 20, 1881, costs taxed at				$72 45

H. E. MANN, *Clerk.*

118 To. S. L. PIERCE, Esq., *Pl'ff's Att'y*:

SIR: You will please to take notice that the foregoing bill of costs and disbursements will be presented to H. E. Mann, Esq., clerk of this court, at his office in the U. S. custom-house, in the city of St. Paul, in said district, on the 20th day of September, 1881, at 10 a. m. of that day, for taxation, allowance, and entry in judgment in said action.

Yours, &c., BIGELOW, FLANDRAU & SQUIRES,
Def't's Att'ys.

The above bill is correct, and may be taxed as set out.
PIERCE & CONGDON,
Pl'ff's Att'ys.

Endorsed: Filed Sept. 20, 1881. H. E. Mann, clerk.

119 Circuit Court of the United States for the District of Minnesota.

WILLIAM R. SCHOFIELD
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

This cause having been tried before a jury, who, on the 27th day of June, A. D. 1881, found a verdict in favor of the defendant, and the court, on motion of the plaintiff, having thereupon granted a stay of all further proceedings thereon for forty days, and such time having now fully expired, on motion of the defendant it is by the court considered, ordered, and adjudged that the plaintiff take nothing by his suit; that the defendant go hence without day, and that it recover of and from the plaintiff its costs and charges by it in and about its suit in this behalf expended, taxed at seventy-two dollars and forty-five cents ($72.45), and that execution issue therefor.

Judgment record signed this 20th day of September, A. D. 1881.
H. E. MANN, *Clerk.*

Indorsed: Judgment roll. Filed Sept. 20, 1881. H. E. Mann, clerk.

120 Circuit Court of the United States for the District of Minnesota.

WILLIAM R. SCHOFIELD
vs.
CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Know all men by these presents that William R. Schofield, as principal, of the county of Washington, State of Minnesota, and John B. Sanborn and S. L. Pierce, of Ramsey county, as sureties, are held and firmly bound unto the Chicago, Milwaukee and St. Paul Railway Company in the sum of two hundred and fifty dollars ($250), for the payment of which, well and truly to be made to the said Chicago, Milwaukee and Saint Paul Railway Company, or their assigns, we bind ourselves, our heirs, administrators, and representatives and assigns, firmly by these presents.

Sealed with our seals, this 6th day of March, A. D. 1882.

The condition of this obligation is such that whereas judgment was rendered and entered in this court on the 20th day of September, A. D. 1881, in the above-entitled action in favor of the defendant, that the plaintiff take nothing by said action, and that the defendant recover of the plaintiff the sum of seventy-two dollars and forty-four cents ($72.44), its costs and disbursements in said action, and whereas the plaintiff, William R. Schofield, has sued out 121 a writ of error on said judgment, and is about to remove the same by said writ of error to the Supreme Court of the United States: Now, therefore, if the said plaintiff in error in said writ shall prosecute his said writ of error to effect, and —— shall fail to make his plea good shall answer and pay all costs which may be awarded and adjudged against him, then this obligation shall be void; otherwise in full force and effect.

WILLIAM R. SCHOFIELD. [SEAL.]
S. L. PIERCE. [SEAL.]
JOHN B. SANBORN. [SEAL.]

Signed, sealed, and delivered in presence of—
EDWARD P. SANBORN.
ANGIER AMES.

THE STATE OF MINNESOTA,
County of Ramsey, } *ss:*

On this sixth day of March, A. D. 1882, personally appeared before the undersigned, notary public in and for said county and State, William R. Schofield, S. L. Pierce, and John B. Sanborn, to me personally well known to be the identical persons named in and who executed the foregoing bond, and acknowledged that they executed the foregoing instrument freely and voluntarily for the uses and purposes therein expressed.

[SEAL.] EDWARD P. SANBORN,
Notary Public, Minn.

State of Minnesota, } ss:
County of Ramsey, }

John B. Sanborn, being first duly sworn, deposes and says:
122 That he is one of the sureties above named, and who executed the foregoing bond, and that he is a resident and freeholder of the State of Minnesota, and worth the sum of five hundred dollars over and above his debts and liabilities, and exclusive of his property exempt from execution.

JOHN B. SANBORN.

Subscribed and sworn to before me, this 7th day of March, A. D. 1882.

[seal.] EDWARD P. SANBORN,
Notary Public, Minn.

(Indorsed): The within bond is hereby approved, and writ of error allowed. R. R. Nelson, judge. Filed March 7, 1882. H. E. Mann, clerk.

Endorsed on cover: Minnesota C. C. U. S. No. 263. William R. Schofield, plaintiff in error, *vs.* The Chicago, Milwaukee and St. Paul Railway Company. Filed 15th September, 1882.

114-615

Office Supreme Court U. S.
FILED.
DEC 1 1884
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States

October Term, 1884.

William R. Schofield,
Plaintiff in Error,
v.
The Chicago, Milwaukee and St. Paul Railway Company,
Defendant in Error.
No. 263.

S. L. PIERCE,
JOHN B. SANBORN,
Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1884.

William R. Schofield,
Plaintiff in Error,
v.
The Chicago, Milwaukee and St. Paul Railway Company,
Defendant in Error.
No. 263.

I.

This action was originally brought in the state court, and was removed to the U. S. circuit court, district of Minnesota.

The action is for personal injury sustained by plaintiff at a crossing of the railroad track of defendant, February 13, 1881.

The case was brought on for trial at the June term, 1881, before Hon. G. W. McCrary, circuit judge, and a jury.

When the plaintiff had introduced his evidence, on motion of defendant's counsel, the court instructed the jury to render a verdict for defendant upon the ground that "the testimony as now disclosed, taken to be true, cannot support a recovery against the defendant."

The court announced its decision granting the motion of defendant's counsel, and instructed the jury, that in view of the decision of the court and the law of the case, it was their duty to find a verdict for the defendant, which the jury did, and the plaintiff's counsel excepted to the ruling of the court directing a verdict for the defendant. See page 52 transcript of the record, and for decision see page 15.

A bill of exceptions, including the evidence, was signed and allowed by the court, and judgment thereafter entered on the verdict, and the case is now in this court on writ of error.

II.

There is but one error assigned, and that is the instruction to the jury to render a verdict for defendant on motion of defendant's counsel.

The plaintiff contends that this was error, and this error he urges as ground for the reversal of the judgment and vacation of the verdict. He contends that the case should have been submitted to the jury for their determination.

III.

THE FACTS IN THE CASE.

PREMISES—The accident was at a railroad crossing, seventy rods above the passenger depot, at Newport (marg. p. 86.) The depot and certain posts and trees obstructed the view of a train coming up toward the crossing, so that such train could not be seen by one above the depot and within 600 feet of the crossing, until he got within thirty-three feet of the crossing (marg. pp. 95, 84).

There is a highway running up from Newport to St. Paul nearly parallel with the railroad. It gradually converges toward it, being crowded in by a fence, and on account of the fence, snow and other obstructions, it would be hard for a team to turn round after getting within thirty feet of the crossing (marg. pp. 103–104.) There is a great deal of travel on this highway, it being the main road to St. Paul (marg. p. 77).

The railroad is on a down grade as it approaches Newport (marg. pp. 89, 110).

THE TRAIN—This was not a regular train, running on schedule time (see answer). The testimony shows that it was running at very high speed (marg. pp. 97, 99). On passing the depot, the steam appeared to be shut off (marg. p. 89). The train was going rather still; no bell or whistle was sounded as it approached the crossing in question. The last alarm heard was *at Willoughby's crossing.*

SPEED AND CHARACTER OF THE HORSE DRIVEN BY PLAINTIFF.—The horse appeared to be walking until he reached the turn to pass over the crossing (marg. p. 78). He was slow and afraid of trains (marg. p. 69).

THE ACCIDENT—The plaintiff with Manning was riding up the highway in a one horse cutter. He has no knowledge about anything relative to the accident. The last thing he remembers is being at Parker's barn, about a mile below (marg. p. 70). He has no knowledge of having looked or not having looked for a train (see page 29 of paper-book). Monroe and Croshaw were eye witnesses. They were walking down the highway, and twenty rods or more above the depot met plaintiff and Manning. After some conversation witnesses continued down the highway and plaintiff and Manning drove up the road, whether fast or slow they cannot tell (marg. p. 92). These witnesses went a *short distance*, when they heard the whistle at Willoughby's crossing. The testimony leaves it in doubt as to how much time had elapsed after parting with plaintiff, before the whistle was heard, and it is therefore uncertain how far plaintiff had driven up the road before these witnesses heard the whistle. There is no reason to doubt that the plaintiff had driven the twenty rods or more required to reach the depot, and had gone an indefinite distance above it toward the crossing before the witnesses heard the whistle, for they state that almost immediately after hearing the whistle, the train came in sight at a rate of speed never before seen on that road, (marg. p. 97). It passed the depot, and when they saw it would not stop, Monroe says "The thought struck me that they must be somewhere *near the crossing*" (marg. p. 80). They looked for them and saw them "*close to the crossing*" (marg.p. 81) From the evidence the jury could have well found that when the train came in sight of parties then passing the depot the plaintiff had passed beyond the depot toward the crossing, and was prevented from seeing it by the depot. Also, that when plaintiff was passing the depot the train was not in sight, and could not have been seen had they looked back at that point.

Returning to the testimony of these eye witnesses, we find that—

After they had heard the train they next saw it approaching rapidly (marg. p. 92.) It passed the depot without slacking speed (marg. p. 92.) The road at the place where they met plaintiff was 280 feet from the railroad track (See plat.) The point where the witnesses were when they heard the whistle was 4300 feet from the crossing. This would make it difficult for them to be certain as to what took place. The wind was blowing down the road from the crossing toward the approaching train (marg. p. 79.)

At the time they saw plaintiff and Manning they seemed to be going slow. But "when he was making the turn he seemed to *jump ahead*." This was when it was six or seven feet from the horse's head to the crossing (marg. p. 81.) The train was then very close. All was as quick as you could clap your hands (marg. p. 81).

KNOWLEDGE OF PLAINTIFF.—He knew there were two regular Sunday trains, (but nothing of special trains being run on that road (marg. 74.) Did not know that trains had been irregular on account of snow blockade. Had no knowledge that freight or passenger trains ever passed the depot without stopping (marg. p. 76.) Knew the time of the regular passenger train (marg. p. 74.)

Time of Regular Sunday Train.—This was due at Newport at 5 a. m. and 8 p. m. (marg. p. 100.)

Time of Accident.—This occurred about 4 p. m. on Sunday (marg. pp. 73, 74.)

The Weather.—It was a very cold day (marg. p. 71.) The wind was blowing hard from the crossing toward the train.

Plaintiff's Chance to See the Train.—We have seen that had plaintiff looked back while passing the depot he could not have seen the train.

Leaving out conjectures, and basing a computation on the basis of facts which the jury might have found from the evidence, it is demonstrable that on the basis of the train running fifty miles per hour it would have required but 15¾ seconds for the train to pass from the depot to the crossing. We know that the train and the horse reached the crossing at the same time. The jury could have found from the evidence that the horse traveled on a walk. Being a slow horse the jury could have found that he went at the rate of three miles an hour. On this basis he would have traveled 69.3 feet while the train was passing from the depot to the crossing. He would have therefore been 69.3 feet from the crossing when the train reached the depot, and had the plaintiff looked back at any time before he got within 69.3 feet from the crossing, the train could not have been seen. In making this distance of 69.3 feet would consume but 15¾ seconds; hence the time to look for the train when it could be seen would be only one-quarter of a minute. This is all the time the witnesses heard the whistle, for they state that almost immediately after hearing the whistle, the train came in sight at a rate of speed never before seen on that road, (marg. p. 97). It passed the depot, and when they saw it would not stop, Monroe says "The thought struck me that they must be somewhere *near the crossing*" (marg. p. 80). They looked for them and saw them "*close to the crossing*" (marg.p. 81) From the evidence the jury could have well found that when the train came in sight of parties then passing the depot the plaintiff had passed beyond the depot toward the crossing, and was prevented from seeing it by the depot. Also, that when plaintiff was passing the depot the train was not in sight, and could not have been seen had they looked back at that point.

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Knowledge of Plaintiff.—He knew there were two regular Sunday trains, (but nothing of special trains being run on that road (marg. 74.) Did not know that trains had been irregular on account of snow blockade. Had no knowledge that freight or passenger trains ever passed the depot without stopping (marg. p. 76.) Knew the time of the regular passenger train (marg. p. 74.)

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Circumstances—The following peculiar circumstances all existed in this case:

First: The depot was the usual place for the trains to stop, and the plaintiff had no knowledge that they ever passed it without stopping.

Second: Trains did not ordinarily go at such speed that they would be out of sight and hearing of a traveler at the time he passed the depot and would reach the depot and the crossing while the traveler was passing from the depot to the crossing.

Third: A reasonable place to look for a train under all the circumstances was at the time plaintiff passed the depot. He could then see a great distance down the road, and if no train was in sight, ordinary care would not require one to look again between the depot and the crossing.

Fourth: Had plaintiff looked when he was passing the depot no train would have been seen, nor, as we have shown, is it likely he would have seen any had he looked at any time before he came within at least seventy feet of the crossing, and quite possibly, not even then.

Fifth: No regular trains were due at that time, and plaintiff had no knowledge that special trains were ever run upon the road without stopping at the depot.

Sixth: Reasonable care required, [and in this case the statute,] that an alarm should be given by the train before reaching the crossing, and under the peculiar circumstances, the failure to give such alarm was notice that the crossing could be passed with safety.

Seventh: It was a very cold winter windy day, and necessary for a traveler to be thoroughly wrapped and tucked in the cutter, which the defendant well knew.

FRIGHT OF HORSE—The fact that the horse was seen to make a sudden spring shows that he was frightened, and it can not be claimed that the plaintiff voluntarily drove upon the track. The train is shown to have approached very fast with little noise, and without giving alarm. This must necessarily have demoralized both horse and driver, and if done by neglect of defendant, and the horse was thereby caused to rush upon the track, or against the locomotive, the liability of the defendant in this action is established, and contributory neglect of the plaintiff not shown to exist.

Strong v. Sacramento and Placerville, R. R. Co., 61 Cal., 326.

The testimony upon which the case turned in the opinion of the court below is as follows:

Plaintiff testified:

"I have no knowledge of being hurt. I don't remember anything about it. I did not see the train. I have no consciousness as to the manner of how I was hurt or what did it to this day. I did not see the approaching train; I don't have any remembrance particularly of having looked for a the plaintiff would have had to see the train had he looked. It is in proof that after coming within 30 feet of the crossing the plaintiff would have had no means of turning off. In reaching that point from the place where he could have first seen the train would have required only a little more than one-eighth of a minute. But from the testimony the jury could well have found that the train was moving even more than fifty miles per hour and the horse less than three miles per hour, and therefore that even less time would have existed for the plaintiff to see the train before it was upon him. It is submitted to the court that not a single fact has been omitted upon which this computation is based, and that the computation made by Judge McCrary is erroneous as to the distance a horse would travel on a walk, and as to the points at which plaintiff could have looked back and seen the train.

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"I have no knowledge of being hurt. I don't remember anything about it. I did not see the train. I have no consciousness as to the manner of how I was hurt or what did it to this day. I did not see the approaching train; I don't have any remembrance particularly of having looked for a train or not having looked at the time I approached that crossing. I don't know that I ever catched myself going across the track without looking both ways. I generally calculate to be pretty careful and I have been twitted of being a coward for being so careful. I think I must have looked back of course * * * I have stated it was my habit of being very careful by looking up and down the track.

I was riding in a cutter, another man with me....We had one horse, a brown pony....I say he was a slow horse ....The man that was with me was killed. I remember nothing about looking or not looking. I have no knowledge of it whatever. I have no knowledge of any train or anything happening to me. Page 29, record.

Cross examination: Coming up the main road at a point 650 feet from the crossing if I had looked around and there had been a train coming along the railroad I could have seen it from that point perhaps three quarters of a mile. Proceeding still further to a point 450 feet from the crossing if I had looked back then and the train was this side of the depot I could have seen it, otherwise not. Going on still further toward the crossing to a point 270 feet from the crossing and looking back that would have the same effect; we could see the depot; on looking back we could have seen that train if it had been this side of the depot. It would not go further. I couldn't see a train behind the depot, but am confident at one hundred feet, two hundred feet, three hundred feet, four hundred feet and six hundred feet I could see a train clear back at the depot....I was driving the team. I don't know whether I heard the train coming or not. I don't know whether Manning looked or not. I don't know whether I heard the whistle or the bell or anything....I can not tell whether the horse got a little unmanageable or not. Page 31.

Question. You say you were struck on the head?

Answer. Yes sir.

Q. What part of the head?

A. In the crown I think; near the top of the head.

Q. Since the injury what is the fact about your memory and your ability to do business?

A. Well I don't think it is good.

Q. In what way does it affect you?

A. Well it seems to be roiled up, confused so that it bothers me to get together."

Upon this testimony the court below in its opinion sums up the case as follows, viz: But giving the plaintiff the benefit of every doubt it remains manifestly true that the plaintiff when within one hundred feet of the crossing might have seen the train coming from the depot and might have avoided the accident by stopping until it passed by.

Page 19, Record.

And hence the case is taken from the jury. This is error. The defendant had been proved to be grossly careless and negligent. No negligence or carelessness has been conclusively proved against the plaintiff, but by this decision the court decides that it is to be presumed from the accident itself in connection with the circumstances proved.

The grave error of the judge, presiding at the trial, as it seems to us, was, in deducing certain facts from particular facts proved which are not conclusively deduceable from the particular facts proved; hence the evidence should have been submitted to the jury for it to draw the proper deductions.

The plaintiff was driving toward the crossing and but a short distance from it when the defendant's train was approaching at the rate of fifty miles or more per hour, which train the defendant could possibly have seen when seventy feet from the crossing, and the plaintiff was struck and injured by the train at the crossing so that his memory has been impaired to such an extent that he does not remember anything about the accident or the events immediately preceding it, and the deduction of facts by the court is that therefore the plaintiff did not look for the train, did not see it approaching, did not try to stop his horse because he did not stop him, and hence his injury was the result of his own carelessness and he can not recover. Our position is that the more rational deductions from these facts are that the plaintiff did look and see the train approaching at the rate of fifty miles an hour, that during the nine seconds intervening between the time he saw it and the fatal collision he made every effort to stop his horse; that the horse from his habit, and the nature of all horses when great noise and confusion of sounds approach them from the rear, to flee and rely wholly upon flight for safety, became unmanageable and bounded forward against the engine or in front of it, and the injury and damage followed. But the question is not whether these latter are the more rational deductions, but whether they are wholly inadmissable as deductions, and the deductions of the court are conclusive from the facts proved. There can be no question that the jury are better capable of judging of the conduct of men and horses under such circumstances than judges, and if from all these facts and circumstances and evidence, the jury should find that the plaintiff did look and listen and that his horse became unmanageable and that plaintiff made every effort to stop his horse and failed, and that ordinarily horses under such circumstances could not be stopped or managed, and that the collision was wholly the result of the defendant's negligence in running at fifty miles an hour across this road without signals, could any court say that such a verdict was without evidence to support it, or even against the weight of evidence? It would seem not, and this is the true test in such a case and the turning point in this case.

Nor can the court say that the plaintiff remembers anything when he swears he does not and can not on account of infirmities resulting from his injury, and hence there is no evidence as to what was done by the plaintiff or the man with him. And yet the court in effect says the plaintiff is a man whose memory is impaired and who remembers nothing from the time that he was distant about three quarters of a mile from this railroad crossing and he does not remember the accident nor looking for the train nor seeing the train, nor anything concerning it although he thinks he must have looked as it was his habit, and therefore, concludes the court, he did not look nor listen and was negligent. Now we insist that the more legitimate deduction and conclusion is that he did look and listen and was unable to avoid the impending accident which he saw.

LAW IN THE CASE.

NO PRESUMPTION OF NEGLIGENCE—It will not be presumed without evidence that the persons do not exercise proper care in a particular case.

Continental Ins. Co. v. Stead. 95 U. S., 16.

In a late case in California the supreme court says, it is not to be presumed that the girl who was driving, recklessly or negligently imperiled her own life or the lives of her younger brothers and sisters.

Nehrbas v. R. R., 14 Am. & Eng. R. R. Cases, 670.

DUTY OF LOOKING FOR TRAIN—PRESUMPTION—While those on a highway when about crossing a railroad track must exercise proper diligence and care with reference to their own safety, when there is an absence of evidence as to the train the defendant could possibly have seen when seventy feet from the crossing, and the plaintiff was struck and injured by the train at the crossing so that his memory has been impaired to such an extent that he does not remember anything about the accident or the events immediately preceding it, and the deduction of facts by the court is that therefore the plaintiff did not look for the train, did not see it approaching, did not try to stop his horse because he did not stop him, and hence his injury was the result of his own carelessness and he can not recover. Our position is that the more rational deductions from these facts are that the plaintiff did look and see the train approaching at the rate of fifty miles an hour, that during the nine seconds intervening between the time he saw it and the fatal collision he made every effort to stop his horse; that the horse from his habit, and the nature of all horses when great noise and confusion of sounds approach them from the rear, to flee and rely wholly upon flight for safety, became unmanageable and bounded forward against the engine or in front of it, and the injury and damage followed. But the question is not whether these latter are the more rational deductions, but whether they are wholly inadmissable as deductions, and the deductions of the court are conclusive from the facts proved. There can be no question that the jury are better capable of judging of the conduct of men and horses under such circumstances than judges, and if from all these facts and circumstances and evidence, the jury should find that the plaintiff did look and listen and that his horse became unmanageable and that plaintiff made every effort to stop his horse and failed, and that ordinarily horses under such circumstances could not be stopped or managed, and that the collision was wholly the result of the defendant's negligence in running at fifty miles an hour across this road without signals, could any court say that such a verdict was without evidence to support it, or even against the weight of evidence? It would seem not, and this is the true test in such a case and the turning point in this case.

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DUTY OF LOOKING FOR TRAIN—PRESUMPTION—While those on a highway when about crossing a railroad track must exercise proper diligence and care with reference to their own safety, when there is an absence of evidence as to the care exercised by the party injured, as in this case, it is not to be presumed that the deceased recklessly or carelessly imperiled his own life or entered upon the track of the road, knowing of the train's approach.

Louisville, etc., R. R. Co. v. Goatz's Adms., 79 Kentucky, 442.

The application of this law is manifest, as the evidence shows that the plaintiff had no consciousness of what hurt him, nor of any of the circumstances immediately preceding the action; not even the sudden lunge made by the horse nor of passing the two witnesses who saw the accident, and as to his companion who was killed, every presumption is in conformity with the law above cited. We have then, in fact, the benefit of the presumptive vigilance of two presumably careful men to take all proper precautions to guard against a danger wherein their own lives were to be the forfeit in the case of neglect.

The obligation on the part of the traveler and railroad company is admitted to be reciprocal in the matter of exercising reasonable care, but as to the traveler, the circumstances may be such as to disarm him of his great safeguard, namely, fear and caution. If these circumstances are shown to exist, they are to be taken into account by the jury in determining the degree of care required on the part of the traveler. On this point Judge McCrary admits the degree of care may be different in referring to the fact that the train was a special one. He says, "This fact may be considered as bearing upon the degree of care and caution required of plaintiff, but I am unable to hold that it excuses him from the duty of looking out for a coming train." It is submitted to this court that when it is conceded that there are special circumstances which tend to raise the question of *degree* of care it is for the jury and not the court to pass upon the question.

While the general rule that persons must look and listen before going over a crossing is admitted, the rule is subject to well defined exceptions, and it also remains for the jury to determine in particular cases when and where the person should look.

When the view was to some extent but not entirely obstructed, the plaintiff drove onto the track and was injured by a train, which he might have seen had he looked, but the train that struck him was an irregular one and was following so close upon one that had just passed the crossing, that he did not look on that account. The supreme court of Iowa held that the question of contributory neglect was for the jury.

Funston v. R. R. Co., 41 Iowa, 452.

In the case of Beisigle v. R. R. Co., 34 N. Y., 622, a person on foot was about to cross the track in a city, and looked east as far as he could see, which was only seven or eight feet, obstructions being in the way, but did not again look east. By this omission he was run over by a rapid train, which he could have seen in time to save himself, "by exercising a little more caution before he stepped on the track." On the trial the court nonsuited the plaintiff. On appeal the N. Y. court of appeals said, Morgan J.: "As an original proposition it seems to me that the omission of a railroad company to sound an alarm when approaching a crossing, especially when the view is obstructed by intermediate objects, is some excuse for the inattention of the way traveler to the danger of an approaching train. The way traveler depends upon his ears as well as his eyes; and when his vision is obstructed, and he is within a few feet of the track and hears no alarm, it ought not to be thought very hazardous to step across the track. If he hears no signal, he does not expect a train to cross his path, when he has but a few feet to go to cross over; and if he, for greater precaution, stops and looks both ways before he makes his last step to reach the track, he exercises more precaution than the majority of our citizens do in similar cases.

"The measure of precaution which prudence suggests is in due proportion to the probability of danger."

Eaton v. R. R. Co., 51 N. Y., 544.

In a place where the view is obstructed by permanent obstacles, a traveler has the right to presume that the railroad will exercise proper care and obey the law. Whether the plaintiff was properly cautious after he reached the place from which he could see the track, was a question for the jury.

Strong v. Sacramento and Placerville R. R. Co., 61 Cal., 326.

In such action it is no defense that the horse of plaintiff became unmanageable, on account of the negligence of defendant in approaching the crossing, and the plaintiff was involuntarily carried to the track and injured by the locomotive. Id.

"If a train were not a regular one, no train being due at the time, the same degree of caution would not be expected on his part, as if it were a regular train and on usual time."

Continental Impv. Co. v. Stead., 95 U. S., 165.

"Whether when the view is partially obstructed, the plaintiff exercised reasonable care under the circumstances, is for the jury."

Nehrbas v. C. P. R. R. Co., 62 Cal., 320.

"When the circumstances under which the plaintiff acted are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury."

Fernandes v. R. R., 52 Cal., 45.

For important cases on this subject, see Kellogg v. R. R., 79 N. Y., 72. French v. R. R., 116 Mass., 537.

In neither of these cases did the plaintiff look, and in each of them he could have seen the train and avoided the injury if he had looked. Both cases were held to be proper ones to be submitted to the jury.

IV.

WHEN QUESTION FOR THE JURY—Under the peculiar practice in the U. S. circuit court, by which a verdict is ordered for the defendant in case the evidence is not of sufficient weight to sustain a verdict for the plaintiff, in case the jury should find for him, the importance of submitting the case to the jury is manifest. A judge is but one man. In matters of common experience and judgment, he is no better qualified to judge than any one of the men on the jury selected from the different departments of life. In fact, his vocation as a judge and lawyer, not unfrequently withdraws him so much from the common business of life, that he fails to apprehend the average standard of human judgment and intelligence, and to grasp the significance of circumstances and inferences therefrom. Under the same facts and circumstances which he may consider too trivial to be of any weight whatever, the jury of twelve men may take a very different view, and by the light and aid of their diversified experience, what seemed trivial to the judge, is shown to be justly decisive of the case. Nor is this diversity of opinion limited to the jury. It often happens that the judges are equally different in their conclusions. Common experience is therefore contrary to the probability of any one man being able to say truthfully that his own views and deductions are in harmony with what all rational men would arrive at on the basis of the same evidence.

The judge retains a supervisory power over the verdict, and authority to set it aside and grant a new trial. This is sufficient protection to the respective parties. The modern rule adopted by the U. S. courts and those of England is too firmly established to be questioned at this time; it is, however, proper to advert to the practice as an additional and very urgent reason why cases should not be taken from the jury, except when the evidence is so incontrovertibly clear that no room is left for a doubt as to the facts or inferences therefrom.

Conn. Mutual Insurance Co. v. Lathrop, 111 U. S., 612.
Hickman v. Jones, 9 Wall, 201.
Chandler v. Van Roeder, 24 How., 224.

The following language of Lord O'Hagen in the late English case of Metropolitan R. R. v. Jackson, 3 App. Cases, 193, cited by this court in Randall v. R. R., 109 U. S., is very appropriate. He says:

"I am sure that your lordships would be very slow to limit the legitimate authority of juries in relation to railway cases, for it is, perhaps, in its honest and vigorous exercise, the best and sometimes the only protection which the general public possess against the default, short-comings and mismanagement of companies. They are potent monopolies, comparatively little subject to the various forms of control which the law and opinion exercise upon individuals, and but for the act of juries in preventing negligence and disregard of the general comfort and safety, the want of control would be a great mischief to society."—Page 204.

The case in which this opinion was given is a forcible illustration of the contrariety of opinion of intelligent, honest men, on the deductions to be drawn from a given state of facts. The facts were few and simple. A porter slammed shut the door of a car, and in so doing caught and injured the thumb of plaintiff. But what was the primary cause of this injury? It was claimed to be the negligent permission of the overcrowding of the car. Had this negligence not existed the plaintiff would have kept his seat. Connecting this primary neglect with the slamming of the door (which in itself was not negligence) and the judge who tried the cause held there was evidence from which a jury might infer negligence, and on submitting the case to the jury, verdict was found for the plaintiff. The case was taken to the court of appeals where it was heard by four eminent judges who were equally divided as to whether the case presented facts upon which rational men might differ in their inferences as to whether there was or was not evidence sufficient to be submitted to the jury. Here we have the opinion of three judges that the evidence was sufficient to sustain the verdict, and of two that it was not. On this disagreement of the four judges, the case was taken to the house of lords, and the verdict set aside on the ground that the slamming of the door was not negligence, and that the antecedent negligence of defendant in permitting the car to be over crowded was not the proximate cause of the injury.

The case of Kellogg v. R. R., 79 N. Y., 72, is equally in point, and in view of this infirmity, common to us all, we can but regret that the old rule as stated by Lord O'Hagen in the English case just cited, "in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case" has been abandoned, and the practice of ordering a verdict for the defendant where it was deemed that although there was some evidence it was not sufficient to be passed upon by the jury, has become the usage of the courts.

The modern practice is so hedged about with doubt and uncertainty on the primary question as to whether the evidence is nothing more than a scintilla or in fact it is such as might after all reasonably satisfy the jury that the fact sought to be proved is established, that the practice is, to say the least, very precarious in the administration of justice. The rule as now practiced in England is succinctly stated in the English case cited by Lord Gordon, as follows: "It is impossible to lay down any rule except that from any given state of facts the judge must say whether negligence can be legitimately inferred, and if the judge is of that opinion, then it is for the jury to say whether it ought to be inferred." —Page 211.

In view of the practice in the United States courts, under which the burden of proving contributory neglect is on the defendant, and that the plaintiff establishes his cause of action by proving negligence of defendant, and damage resulting therefrom, we submit that in this case the claim of the defendant that the evidence introduced by plaintiff in making out his case conclusively establishes contributory negligence is erroneous.

It is not like a case in which the burden of proving due care on the part of the plaintiff is cast on the plaintiff by the rules of evidence. In this case it is enough to satisfy the court that the inference from the evidence as to whether the plaintiff was or was not negligent is fairly open to controversy. In that case the determination was for the jury and not for the court.

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Clerk.

SUPREME COURT
OF THE
UNITED STATES,

OCTOBER TERM, 1884. NO. 263.

WM. R. SCHOFIELD,
Plaintiff in Error,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

CHAS. E. FLANDRAU,
Counsel for Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1884.

WILLIAM R. SCHOFIELD,
Plaintiff in Error,
vs.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Defendant in Error.

BRIEF AND POINTS OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This case arises from a collision at a railway crossing of a public highway. The case is very simple and free from all complications or embarrassments. A train was coming from the south towards the north, going to St. Paul. The track of the railroad was straight and level. The country all about where the accident happened, was open and on a level prairie. The wagon road on which the plaintiff was driving, and the railroad track ran in nearly the same direction, but not exactly so. The difference in direction will be seen by taking the point of intersection between the wagon road and the railroad at the crossing, and at a point about seventy rods back, where the depot stood, and there the tracks of the wagon road and the railroad were two hundred and eighty feet apart.

The court will see that the railroad and the wagon road formed an elongated V, the upper or wider part of which placed the roads two hundred and eighty feet apart, and from which point to the point of juncture at the lower end of the V was a distance of seventy rods.

The plaintiff was driving down the wagon road towards the point of juncture of that road with the railroad. He had a slow, manageable horse. When he got to a point six hundred feet from the crossing, where the accident occurred, he could see from there the whole railroad track, and any train that might be on it, from the crossing back to the depot, a distance of seventy rods, and such sight continued entirely unobstructed from that point to the crossing. And when he got to a point thirty-three feet from the crossing his range of vision was extended a considerable distance beyond the depot.

If the train had passed the depot when the plaintiff was at any point at or within six hundred feet from the crossing, he could not have helped seeing it had he looked for it, and had the train not reached the depot when the plaintiff arrived at a point thirty-three feet from the crossing, he could have seen it beyond the depot from any point on that thirty-three feet, had he looked for it. These facts are entirely undisputed in the case.

The train had passed the depot long before the plaintiff arrived at a point thirty-three feet from the crossing. He must have been over one hundred feet from the crossing when the train passed the depot. Yet he drove quietly along, heedless of the danger, without looking or listening, knowing perfectly well he was approaching a railroad track, and drove right into the engine. The engine did not run over him; he ran into the engine.

At any point on the road, had the plaintiff looked and seen the train coming, all he had to do to render himself perfectly safe was to stop his horse. He had no occasion to turn or in any way change his course; he simply had to stop and wait less than a minute, and all possible danger would have been passed.

ANALYSIS OF THE TESTIMONY IN SUPPORT OF THE ABOVE STATEMENT.

The witness Wm. R. Schofield, the first witness sworn and the plaintiff in the case, does not throw any light on the case. He claims that the accident deprived him of all memory on the subject of how or why it occurred. *Fols.* 51 *to* 53.

Dr. A. H. Stein, the second witness, simply describes the injury sustained by the plaintiff. *Fols.* 53 *to* 64.

Mrs. Schofield, the wife of the plaintiff, simply swears as to the condition of the plaintiff. *Fols.* 65 *to* 67.

Wm. R. Schofield being recalled, at *Fol.* 69, says he was familiar with the crossing. That the horse he was driving was slow, and never undertook to run with him in the world. At *Folio* 71, he repeats that he knew all about the road and the crossing, and that it was a little less than seventy rods from the depot to the crossing. At *Fols.* 72 *and* 73, he also swears that at six hundred and fifty feet, four hundred and fifty feet, two hundred and seventy feet, and down to one hundred feet before he reached the crossing, if he had looked, and a train had passed the depot, he could have seen it. Also swears that he don't know whether he struck the train or the train struck him; that is, whether the train had the crossing, and he ran into the locomotive, or whether he had the crossing and the train ran into him. He knew they ran trains frequently on Sunday. *Fol.* 74. The testimony of this witness is only good for the facts he swears he has knowledge of.

Henry C. Monroe, sworn at *Fol.* 76, was one of the men who met the plaintiff and Manning as they drove along the road toward the crossing. The place of meeting was nearly opposite the depot. *Fol.* 77. This was two hundred and eighty feet from the depot in a straight line east and west, and seventy rods from the crossing north and south. He then walked on with George Crawshaw and heard the train whistle. He then looked up and saw it coming very fast. He watched the train until it passed the depot; then he looked after the plaintiff, who was driving down the wagon road, and when he saw plaintiff he thought he was standing still. This, of course, was because plaintiff was in a straight line from him, and was not near the crossing. He then discovered that the plaintiff was moving; this, of course, arose from plaintiff having made the turn out of a straight line toward the crossing. This testimony shows that the train had passed the depot, and was in full sight of plaintiff, had he looked for it, long before he reached the crossing. He says the horse was walking until they commenced to make the turn to go across the crossing. *Fol.* 78.

Edward George, *Fol.* 78. Simply testified to the correctness of plaintiff's map.

Henrg C. Monroe was then recalled, at *Fol.* 79. At *Fol.* 80 he reaffirms his evidence of seeing the train pass the depot, and then looking for plaintiff and seeing him before he reached the crossing. The evidence is the same throughout. *Fols.* 81 *and* 82. *At Fol.* 86, *page* 38, he says, "when we heard the train come, we turned round and noticed the train as it got to the depot, then I thought of these people and turned around to look, and they were going slowly along. They were away up here (indicates) when the train was at the depot, and, I say, at any of these points, if they had looked back they could have seen the train when it got to the depot. At first sight they seemed to me to have stopped, because I was looking right at the rear of them. I discovered immediately that they were in motion."

He also swears at *Fol.* 91, that "all the wreck of the accident was on the west side of the track, the men, cutter, horse and everything;" thus showing that the train had the crossing, and the cutter ran into the train, instead of the train running over the cutter.

It is difficult to exactly locate the position of the cutter at the time this witness saw it after the train had passed the depot, but as he says "they were away up here when the train was at the depot," and indicated the place on the map, we have a right to assume they were a good distance from the crossing, say one hundred feet. This is the distance the court in its opinion locates the cutter from the crossing by a calculation putting the rate of the train at fifty miles an hour, and the horse at a walk. *See Fol.* 49, *p.* 19. But we know that the train was not going at such a speed, nor was the horse probably moving so slowly.

George Crawshaw was the next witness, sworn at *Fol* 91. He heard the whistle in Willoughby's field. *Fol.* 92. A great many freight trains pass the depot without stopping. *Fol.* 92. As soon as the train passed the depot he looked for Schofield and Manning. Saw them; thought they were standing still; second glance saw they were moving. *Fol.* 92. At *Fol.* 94 he says: "I was two hundred and eighty feet from the railroad track — perhaps thirty or thirty-five rods from the depot when that bell was rung. I could not state to a foot just when the bell commenced ringing; I can state that I did not hear it ringing after it passed the depot."

This testimony shows that he heard both the bell ring and the whistle blow, but he does not locate the ringing of the bell after the train passed the depot.

In his cross-examination he says the usual rate of express trains on this road is from twenty to twenty-five miles per hour. *Fol.* 95.

He also says, at *Fol.* 95: "I suppose these gentlemen in this cutter, driving along down after they had the conversation with us, could have stopped anywhere along in the road by simply pulling up and saying, 'Whoa!' I know of no reason why they couldn't. After they had got within six hundred feet of the crossing, if they had turned around and looked back, they could have seen a train at the depot. If there had been a train there, with the engine past the station, they could have seen it. The station house, I understand, is over seventy rods from the crossing. When they got within thirty-three feet of the crossing, if they had looked back, they could have seen a train coming away back of the curve, a distance of 2,320 feet from crossing."

The testimony of this witness is very similar to that of the last, with whom he was walking when the train passed the depot, only a little more full and particular.

Isaac E. Trevette is the next witness, sworn at *Fol.* 97. His testimony is entirely immaterial to the issues presented on this writ of error, unless we refer to the fact that he heard the whistle in Willoughby's field, *Fol.* 98, and that he has seen passenger trains that did not stop at the depot, *Fol.* 99, and that the following admission was made by counsel in the course of his evidence at *Fol.* 104, foot of *page* 46, which seems to us to be conclusive of the whole case, to-wit:

"It is admitted that from any point on the wagon road, six hundred feet before reaching the crossing, the entire railroad is visible from the crossing to the depot."

At *Fol.* 105, this witness testifies: "If a man driving along the six hundred feet point toward the crossing, if he looked back and saw a train coming after it leaves the depot, and should pull up his horse and stop, I don't think there would be any difficulty for a train to pass him, and he go along behind it."

Gilbert M. Bigelow, who was sworn at *Fol.* 106, throws no light on the case at all, except that he heard the whistle in Willoughby's field, and did not hear it again, nor did he hear the bell.

Levi Bailey, sworn at *Fol.* 109, simply swears that the train was going faster than usual.

H. A. Durang, sworn at *Fol.* 110, does not influence the case in anyway that we can see, unless, perhaps, where he says that if these men, when within thirty or forty feet of the railroad had seen the train coming, the safest thing for them to have done would be to stop.

DEFENDANT'S ARGUMENT.

There can be no doubt that if the view is clear when a traveler on the highway is approaching a railroad crossing, and he can see a train coming, that it is his duty to look and listen before going onto the track; and if he does not, but ventures on and is injured he cannot recover.

This is well stated in the case of *Ellen Brown, administratrix, vs. this R. R. Co., in 22 Minn. Reports at page* 167, as follows:

"A railroad crossing over a public highway upon the same grade is a place of danger, and is of itself a warning to one about to go upon it to be careful and vigilant, to the extent of his opportunity, in the use of his eyes and ears to discover an approaching train in time to avoid it; and when the vision of the traveler is so unobstructed along the track that he can easily discover an approaching train, or the circumstances are such that his sense of hearing, if used, must apprise him of the same fact in time to escape it, it will be presumed, under ordinary circumstances, in case of collision, that he did not look or listen, or, if so, that he heedlessly disregarded the knowledge thus obtained. In either of these cases, as a general rule, no action can be maintained."

Wharton on Negligence §§ 382, 383, *and notes and cases cited.*

In this Brown case a verdict was rendered for the plaintiff, a motion for a new trial denied by the court that tried the case and the Supreme Court reversed the decision on a state of facts infinitely less strong than the case at bar.

This rule has been affirmed in nearly all the states of the Union, and emphatically by this court.

In *Railroad vs. Houston* 95, *U. S. Rep.* 697, the whole doctrine is covered. The syllabus of the case is as follows:

"The neglect of the engineer of a locomotive of a railroad train to sound its whistle or ring its bell on nearing a street crossing, does not relieve a traveler on the street from the necessity of taking ordinary precautions for his safety. Before attempting to cross the railroad track, he is bound to use his senses—to listen and to look—in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if using them he sees the train coming, and instead of waiting for it to pass, undertakes to cross the track, and in either case receives an injury, he so far contributes as to deprive him of any right to complain. If one chooses in such a position to take risks, he must suffer the consequences. They can not be visited upon the railroad company."

The opinion fully sustains the syllabus, and the numerous authorities cited fully justify the opinion and decision.

We do not care to incumber our brief with more than a mere reference to the cases cited in the brief of counsel for plaintiff in error in this case.

It will be seen by the cases we have cited from the Supreme Court of Minnesota, and the Supreme Court of the United States on the points involved in this case, that the two jurisdictions are in perfect harmony, as they should be, and that accord should not be disturbed.

To know that the doctrine established in the case at bar is good law and subserves the best interest of the public, the court has only to read the concluding paragraph of Judge McCrary's opinion in deciding this case, found in the Record at *page* 19, *Fol.* 50.

Second.

Was there anything to be submitted to the jury upon which they could have found a verdict for the plaintiff that would not have been set aside by the court?

The rule on this point is well stated by Judge McCrary in the opening of his opinion at *page* 15, *Fol.* 42, as follows:

"It is now settled law, so far as the federal courts are concerned, that if, upon the evidence, the court would set aside a verdict against a party if rendered, it is its duty to charge the jury not to return such a verdict."

22 *Wall.* 119.

95 *U. S.* 697.

This is the law of all courts, but administered in different ways, some by nonsuit, and some, as in the federal courts, by instructing the jury to find for the defendant.

Having shown clearly that if the case had been submitted to the jury, and a verdict had been rendered for the plaintiff, it would of necessity, have been set aside by the court, either on motion for a new trial, or on writ of error to a superior court, we have logically established the correctness of the court's ruling in not allowing such a verdict to be rendered.

Third.

What character of answer does the plaintiff in error make in his brief to the ruling of the court?

According to his own calculation (page 5) as to the position of the cutter from the crossing at the time the train appeared in sight on passing the depot, he places the cutter 69.3 feet from the crossing, and that puts the train 70 rods from the crossing by all the evidence. He complains that in driving this last 69.3 feet he was not bound to look for the train, because it only took a quarter of a minute for both cutter and train to pass over the distance. Now 69.3 feet is a good long distance, and a quarter of a minute a considerable time when you look at your watch and observe it pass. And of all the divisions on the road of 69.3 feet in length, the only one of much importance to the plaintiff was the last one before going on the crossing. He could have driven over any other similar distance without looking for a train with perfect safety and impunity, but it was the very essence of carelessness and negligence to venture one foot of that last 69.3 feet without looking and listening. Of course, if he had done either no accident could have happened, unless he tried to beat the train over, in which case he cannot recover.

He says again on page six of his brief that "a reasonable place to look for a train under all the circumstances was at the time the plaintiff passed the depot. He could then see a great distance down the road, and if no train was in sight, *ordinary care would not require one to look again between the depot and the crossing.*"

The counsel in this statement (and it is about the best the case allows him), lays before this court the proposition that a man approaching a crossing is required to look for a coming train at a point 70 rods or 1,155 feet before he reaches it, and that ordinary care would not require him to look again, and that under the undisputed, *admitted* facts in this case, that the whole railroad from the crossing to the depot, 70 rods, was visible for the last 600 feet before the traveler reached the crossing. This proposition is sadly at variance with the rulings of this court, and the common sense of the situation.

On page ten of the brief the counsel complains that the court made the wrong deductions from the facts proven. He claims that because the plaintiff could have seen the train had he looked, and in time to have avoided all danger, and could have stopped his horse and did not. That he did look, and could not stop the horse, or, in other words, the horse was fractious and difficult to control, because the proof shows he was not fractious and was perfectly manageable. In fact, the counsel would draw conclusions from the evidence in exact opposition to its purport and meaning, and complains that the court did not agree with him.

On page eleven he claims that because one man was killed and the other could not remember what took place, and there is no evidence of what did take place, except the facts which were proved; that the facts should all be ignored, and the jury allowed to guess at what the man who was dead and the man who had lost all memory might have sworn to had they been able to relate their experience. Our only answer is a reference to the case of *R. R. vs. Houston*, 95 U. S. 697, where the party was killed, no one saw it, and the facts proven were all the court had to rely on.

Fourth.

We will not trouble this court with any analysis or criticism of the many cases the counsel cites in his brief, in support of the very peculiar positions he assumes. They are, some ot them good law for the facts of the case in which they were decided, and some of them bad law; but none of them in any way applicable to the facts of the case at bar. This court does not, in our opinion, desire any extended discussion, or presentation of authorities in a case where the facts are so simple, clear and undisputed as those presented by the case at bar.

The judgment should be affirmed on a mere statement ot the case.

Chas. E. Flandrau,
Counsel for Defendant in Error.